

INDEX.

A

ABANDONMENT.

See DEDICATION TO THE PUBLIC.

ACCOUNT.

See PRACTICE, 81.

ACKNOWLEDGMENT OF DEEDS.

See EVIDENCE, 11, 12. CONVEYANCE.

ACTION FOR USE AND OCCUPATION.

1. An action for use and occupation can not be maintained unless the relation of landlord and tenant exists between the parties founded on an agreement express or implied. *Cohen v. Kyler*, 122.

ADMINISTRATOR'S BOND.

1. A judgment rendered by a probate court against an administrator, requiring him to pay over to the distributees a certain sum of money as assets of the intestate's estate, is, in the absence of fraud or collusion, conclusive upon the securities of the administrator in a suit on his official bond. *The State, to use, &c., v. Holt*, 340.

ADMINISTRATION.

See RELEASE, 3.

1. Where a judgment is rendered against a person in his lifetime it need not be allowed as a demand against his estate; a transcript of the judgment may be filed in the probate court and the court should determine its class. *Carondelet v. Desnoyer's Adm'r*, 36.
2. Although an appeal will lie from an order of a probate court revoking letters of administration, yet, where the revocation is made for the reason that a will had been found and admitted to probate, the circuit court can not on such appeal inquire into the sufficiency of the proof upon which the probate court acted in granting probate of the will. *In re, Milton Duty's Estate*, 43.
3. The validity of a will duly proven can be contested only in a proceeding instituted for that purpose under section 30 of the act concerning wills (R. C. 1845, p. 1083; R. C. 1855, p. 1571, sec. 30); an appeal will not lie from an order of a probate court granting probate of a will. *Id.*
4. A surviving partner retained possession of the partnership effects and

ADMINISTRATION—(Continued.)

- gave bond under sections 50 and 51 of the first article of the administration act of 1845 (R. C. 1845, p. 70); a settlement was made by him in the probate court and an order was made by said court apportioning to the estate of the deceased partner one-half of the balance found to be in the hands of such surviving partner. *Held*, in an action on the bond to recover a debt due to the deceased partner for money advanced by him to the firm, that this settlement was not conclusive as against his estate as to the amount due thereto from the surviving partner, or as to the amount of assets in the hands of the latter. *The State, to use, &c., v. Baldwin*, 103.
5. A judgment rendered by a probate court against an administrator, requiring him to pay over to the distributees a certain sum of money as assets of the intestate's estate, is, in the absence of fraud or collusion, conclusive upon the securities of the administrator in a suit on his official bond. *The State, to use, &c., v. Holt*, 340.
 6. In an action on a guardian's bond the settlements and allowances of the guardian in the probate court are conclusive upon the ward. *Mitchell v. Williams*, 399.
 7. An equitable proceeding to set aside allowances of a probate court in favor of a guardian can only be sustained by proof that the allowances were fraudulently procured by such guardian. *Ib.*
 8. Whether an administrator shall be charged with interest on money in his hands belonging to his intestate's estate is to be determined by the circumstances of each case; he is not to be so charged as a matter of course. *Madden's heirs v. Madden's Adm'r*, 544.
 9. The fifty-sixth section of the act of July 4, 1807, (1 Terr. Laws, p. 138,) authorized the sale, under the order of the general court, of an intestate's estate for the payment of his debts, although he left no lawful issue. *Blair v. Marks*, 579.
 10. The administrator was, in the case of such a sale, authorized to make a deed to the purchaser. *Id.*
 11. After the lapse of forty or fifty years from the date of such a sale, proof of the advertisements and other prerequisites of a legal sale could not be insisted on. *Id.*

AGENT.

See PRINCIPAL AND AGENT.

AGREEMENT.

See COVENANT. RELEASE. INSURANCE. COMMON CARRIER. ARBITRATION. BREACH OF PROMISE OF MARRIAGE.

1. A statement, in a letter to a party sought to be retained as clerk of a boat then building, that the boat was expected out at a specified time, can not be construed into a guaranty or engagement that she would be out at the time named. (*Johnson v. McCune*, 21 Mo. 211, affirmed.) *Johnson's Adm'r v. McCune*, 171.
2. Where there is a special contract to do certain work and the contractor fails to perform the work according to the terms of the contract, no recovery can be had by him on the contract. *Lowe v. Sinklear*, 308.

AGREEMENT—(Continued.)

3. If, however, services are rendered by him which are of value to the person with whom he contracts and are accepted by such person, an obligation is thereby created to pay the reasonable value of such services, not exceeding the contract price, taking into consideration and making allowance for any damage resulting from the breach of the contract. *Id.*
4. If a minor enter into a special contract to do certain work, he may avoid such contract and may recover a reasonable compensation for the work done, the damage resulting from the avoiding of the contract being taken into consideration and allowed. *Id.*
5. A contractor engaged in the performance of certain work may assign to another the money to be due to him on its performance. *Leahy v. Dugdale's Adm'r*, 437.
6. At law there will be no implication of a promise on the part of a step-daughter to pay her step-father for necessities furnished by the latter during the minority of the former. *Gillett v. Camp*, 541.
7. A. agreed to deliver to B. at a specified place on the Mississippi river "two rafts of pine logs containing each from 350,000 to 400,000 feet, more or less—one raft to be of the first run in the spring, and the other as soon thereafter as possible (want of sufficient water and dangers of navigation excepted); and in case of a loss of a portion of said rafts the loss to be deducted *pro rata* as per number of logs contained in the whole." A. brought to the place specified a raft containing 419,226 feet; he cut off and delivered to B. 323,385 feet of this raft, B. demanding the whole raft. *Held*, in a suit by B. to recover damages of A. for his refusal to deliver the whole raft, 1st, that B. was not entitled under the contract to demand the whole raft of 419,226 feet, the words "more or less" not covering so great an excess as 19,226 feet; that the delivery of a raft containing any quantity of logs between 350,000 and 400,000 feet would be a legal compliance with the contract; 2d, that it was competent for A. to show that when the raft in question started from his boom in Minnesota, it contained, according to the St. Croix scale and measurement, 486,402 feet of logs, and that 67,176 feet were lost, by reason of want of water and dangers of navigation, in running it to its place of destination. *Patterson v. Judd*, 561.

ALLOCATION.

See PRACTICE AND PROCEEDINGS IN CRIMINAL CASES.

ALTERATION.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

AMENDMENTS.

See PRACTICE, 18.

APPEAL.

See COUNTY COURTS.

1. An appeal will lie to a circuit court from an order of a county court removing the guardian of an insane person. *Hall v. Audrain County Court*, 329.

APPEAL—(Continued.)

2. In perfecting such an appeal, an affidavit and appeal bond or recognition are not required. *Id.*
3. A mandamus will lie in such case from the circuit court to the county court requiring it to grant an appeal, although a writ of error might have been resorted to. *Id.*
4. An appeal to the supreme court must be made, under the revised code of 1855, during the term at which the judgment or decision appealed from is given; it can not be made before the clerk in vacation. (R. C. 1855, p. 1287, sec. 11.) *Stavely v. Kunkel*, 422.

ARBITRATION.

1. An agreement to refer a matter in dispute to arbitrators can not be specifically enforced. *King v. Howard*, 21.
2. When an agreement to submit a matter in dispute to arbitration describes the subject of dispute thus: "A matter in difference between the parties;" and the parties afterwards appear before the arbitrators and litigate a matter without any denial that it is the subject of dispute between them, they should not afterwards be heard objecting to the vagueness and indefiniteness of the agreement. *Price v. White*, 275.
3. Where a notice is given that a motion will be presented to a court on the first Monday of May for the confirmation of an award, and the legislature afterwards changes the time of holding said court from the first to the second Monday, the notice will be sufficient; the party to whom the notice is given must take notice of the change. *Id.*
4. An umpire, chosen by arbitrators upon their own disagreement to decide the matter submitted to arbitration, must be sworn before he can hear the evidence in the cause. *Frissell v. Ficks*, 557.
5. Where a matter in dispute is submitted to arbitrators with a power on their part in case of a disagreement to call in an umpire, the umpire may be appointed before the arbitrators commence their investigation, or at any stage of the proceedings; he ought to see and hear the witnesses. *Id.*
6. It does not invalidate an award that the arbitrators join with the umpire in making the same. *Id.*
7. Where in a submission to arbitration the matter in dispute is stated to be the "taking of a quantity of timber from the land" of the plaintiffs, the arbitrators would not be authorized to assess treble damages. *Id.*

ASSAULT.

1. If one having a gun in his hands raises it to a level and directs it towards, but not directly at, another, and threatens to kill him if he advances in a certain direction, it will constitute an assault; it is not necessary that the gun should be raised to the shoulder. *The State v. Epperson*, 255.

ASSIGNMENT.

See AGREEMENT. INSURANCE, 3. SALE.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

1. Assignments for the benefit of a portion of the creditors of the assignor

ASSIGNMENT FOR THE BENEFIT OF CREDITORS—(*Continued.*)

are valid notwithstanding section 39 of the act concerning voluntary assignments; that section operates to overthrow all provisions in assignments giving preferences among the designated creditors. *Woods v. Timmerman's Assignee*, 107.

2. A provision in an assignment providing for the payment of a particular debt of a designated creditor would be valid. *Id.*
3. Whenever it appears from the face of an assignment of a stock of goods to a trustee for the benefit of certain designated creditors that it is the intent of the parties thereto that the grantor shall be allowed to remain in possession of the property assigned and to dispose of the same in the usual course of business until default, such deed of assignment should be held to be a conveyance in trust to the use of the grantor within the first section of the act concerning fraudulent conveyances, and consequently void as against creditors. *Stanley v. Bunce*, 269.
4. It is not necessary that the deed of assignment should expressly provide that the grantor should remain in possession and continue to dispose of the goods in the usual course of business; it is sufficient to avoid the assignment that such appears, from a consideration of the whole instrument, to be the intent of the parties. *Id.*
5. The term "voluntary," as applied to conveyances within the act concerning voluntary assignments (R. C. 1852, p. 202), means *voluntary* as opposed to *compulsory*; a conveyance to a creditor in trust for himself as well as the other creditors of the assignor is a voluntary assignment within the meaning of said act. *Manny v. Logan*, 528.

ASSUMPSIT.

See AGREEMENT. BREACH OF PROMISE OF MARRIAGE.

ATTACHMENT.

See JUSTICES' COURTS. EVIDENCE, 15.

1. A justice of the peace, under section 21 of the second article of the attachment act of 1845 (R. C. 1845, p. 151), ordered the sale of a wood-boat in the custody of a constable under a writ of attachment issued by said justice. *Held*, that, on a final determination of the attachment suit adversely to the plaintiff therein, the defendant would be entitled to the entire proceeds of the sale of the boat, and might recover the same from the constable, although no order had been made by the justice with respect thereto. *Snead v. Wegman*, 176.
2. Any sum that might be allowed the constable, under section 45 of the second article of the attachment act of 1845, as compensation for his trouble and expense in keeping the boat, should be taxed as costs in the cause and would fall on the unsuccessful party; the constable would not have a lien on the proceeds of the sale of the boat for the necessary expenses of keeping and selling it. *Id.*
3. Only the interest of the defendant in the attachment could be attached and sold; hence he alone could sue the constable for the proceeds of the sale of the boat. *Id.*
4. To entitle a garnishee to indemnification for expenses incurred by him,

ATTACHMENT—(Continued.)

it is not necessary that he should appear and answer in the garnishment proceeding. *Bain v. Chrisman*, 298.

5. Where, in an attachment suit, in which the defendant is notified by publication and does not appear and answer, judgment by default is rendered against him, such judgment will bind only the property attached. (R. C. 1855, p. 250, § 43, 44.) *Johnson v. Holley*, 594.
6. A judgment in an attachment suit in the following form: "It is therefore considered by the court that the said plaintiffs recover of the said defendant the sum of \$368.50 as and for their demand, and also their costs and charges herein expended; and that they have a special execution on the property attached, to-wit, lot No. 9," &c., is in substantial compliance with the statutory provisions. *Id.*

ATTORNEY AT LAW.

See INFANCY.

1. Communications made to an attorney at law as such are privileged, and the attorney can not be permitted to testify concerning them without the consent of the client. This rule applies to the case where two persons, having hostile interests, consult the same attorney, at the same time, with respect to the matter in dispute, and one of such parties calls upon the attorney to testify with respect to the declarations and admissions made by the other at the consultation. *Hull v. Lyon*, 570.
2. Whether a communication is a privileged one is a question for the court. *Id.*

ATTORNEY IN FACT.

See MORTGAGE, 7.

AWARD.

See ARBITRATION.

B

BAILMENT.

See COMMON CARRIER.

1. To authorize the lender of a chattel to recover its value of the borrower, it must appear that it has been lost or destroyed through the negligence of the latter or has been converted to his use; there can be no recovery as for a conversion of the chattel, where the evidence merely shows that there was a loan and a failure on the part of the borrower to return the thing borrowed; a demand must be shown. *Ross v. Clark*, 549.

BANK OF MISSOURI.

See CORPORATION, 1.

BANKRUPT'S DISCHARGE.

See INSOLVENT LAWS.

BILL OF LADING.

See COMMON CARRIER.

BILLS OF EXCEPTIONS.

See PRACTICE.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

See MORTGAGE.

1. A material alteration of a promissory note or bill of exchange will render the same invalid, even in the hands of an innocent holder, as against any party thereto not consenting to the alteration. *Trigg v. Taylor*, 245.
2. This rule applies to an accommodation note fraudulently altered before it is negotiated. *Id.*
3. Unless it is expressed in a promissory note that it is "for value received, negotiable and payable without defalcation," the maker thereof will be allowed against an assignee of the same every just set-off or other defence that existed at the time of or before notice of the assignment as against the assignor thereof. *Thomson v. Roatcap*, 288.
4. A surety in a promissory note, who gives notice to the payee to commence suit forthwith against the principal, a non-resident of the state, is not exonerated from liability by a failure of such payee to commence suit within thirty days after such notice. (See R. C. 1855, p. 1454.) *Phillips v. Riley*, 386.
5. A promissory note given by one partner in the name of the firm is binding, *prima facie*, upon all the partners; if the note be given for the individual debt of the partner executing the same, or for an indebtedness created in relation to a matter known to be foreign to the business of the partnership, the partnership is not bound. It devolves upon the partners, in order to escape liability, to show these facts. *Hickman v. Kunkle*, 401.
6. A suit on a promissory note by an assignee against the maker is triable at the first term, although the assignment is denied. *Armstrong v. Johnson*, 420.
7. Fraud in the consideration of a negotiable promissory note is no defence to an action thereon by an endorsee to whom the same was endorsed before maturity without notice. *Jaccard v. Shands*, 440.
8. The relation of maker and endorser of a promissory note so far continues, after the recovery of judgments against them at the suit of an endorsee, that an agreement with the maker to stay execution as to him for a specified period will operate a discharge of the endorser, and entitle him to a perpetual stay of execution. *Smith v. Price*, 505.
9. The character of a notice to endorsers of the dishonor of a promissory note may be proven by parol testimony. A notice to produce the notice is not necessary. *Johnston v. Mason*, 511.
10. A., a citizen of and residing in the state of Missouri, sold goods to B., who also at the time of the sale resided in said state; B. gave his note to A. for the indebtedness thus incurred; B. afterwards went to and became a citizen of California; A. transmitted said note to one C., an attorney at law in California, for collection; C., deeming it for the interest of A., surrendered said note to B., and received in renewal thereof another note from B.; this note was made payable to the order

BILLS OF EXCHANGE AND PROMISSORY NOTES—(Continued.)

of "C., attorney of A.;" while this note remained in the hands of C., B. obtained a discharge therefrom under the insolvent law of California; C. afterwards endorsed the note to A. in Missouri, who commenced a suit thereon against B. *Held*, that the discharge under the insolvent law of California could not be regarded as a valid discharge by the law of this state. *Crow v. Coons*, 512.

BOATS AND VESSELS.

1. If, in a case of collision, both parties are in fault and the fault or negligence of each contributes to the injuries received, neither party can be made to respond to the other. This doctrine does not, however, apply to a case in which the fault or negligence of the party seeking a recovery contributes only remotely and indirectly to the injury complained of. *Adams v. Wiggins Ferry Co.*, 95.
2. If both parties actively contribute to the injury at the time of its commission, there can be no recovery by either; where, however, the fault or negligence of one party is merely passive, as where his wrong consists in mooring his boat in a prohibited place at a wharf, he may recover for an injury arising from a collision if the other party does not exercise ordinary care and prudence. *Id.*
3. The act concerning boats and vessels (R. C. 1845, p. 180) applies to boats and vessels owned in sister states as well as to those owned in Missouri. (*Yore v. Steamboat C. Bealer*, 26 Mo. 426, affirmed.) *Wood v. Steamboat Fleetwood*, 159.
4. Where the rate of freight inserted in a dray ticket is "30 cents per hundred" and the clerk of a steamboat signs the same by mistake or oversight, and the shipper of the goods at the time he puts the same on board for transportation has no knowledge of the mistake, and when it is discovered refuses to pay a higher rate of freight and demands his goods of the boat, and its officers fail to re-deliver the same, and transport them to their place of destination, they will not be entitled to demand in behalf of the boat more than 30 cents per hundred. *Id.*
5. Where a complaint filed against a steamboat to enforce a lien for wages states "that thirty days have not elapsed since the demand for services accrued to him," and is accompanied by an affidavit to the effect that the demand sought to be enforced "is the only demand that he [complainant] has against said steamboat;" such complaint is sufficient. *Byrne v. Steamboat St. Mary*, 296.
6. The forty-second section of the act concerning boats and vessels (R. C. 1855, p. 313), providing that suits to enforce liens in any other than the first class shall, in St. Louis county, be commenced within six months, does not apply to causes of action that had accrued more than six months previous to the 1st of May, 1856—the day the revised code of 1855 went into effect. *Ridgley v. Steamboat Reindeer*, 442.
7. Suits instituted in the St. Louis court of common pleas are triable at the return term "in all cases in which the parties continued to be proceeded against at such term shall have been personally summoned for at least fifteen days before the first day of such term;" (R. C.

BOATS AND VESSELS—(*Continued.*)

1855, p. 1595;) inquiry of damages may be made at the return term in a case of judgment of default against a steamboat. *Id.*

8. A complaint against a steamboat, under the boat and vessel act, verified as follows: "A. B., attorney for plaintiff, makes oath and says he believes the foregoing petition and the matters therein as stated are true. A. B., attorney for plaintiff," is insufficiently verified. *Eldridge v. Steamboat William Campbell*, 595.

BONA FIDE PURCHASER.

See VENDORS AND PURCHASERS. MORTGAGE. CONVEYANCE.

BOND.

See GUARDIAN'S BOND. ADMINISTRATOR'S BOND. INDEMNIFICATION BOND.

BORROWER.

1. To authorize the lender of a chattel to recover its value of the borrower, it must appear that it has been lost or destroyed through the negligence of the latter or has been converted to his use; there can be no recovery as for a conversion of the chattel, where the evidence merely shows that there was a loan and a failure on the part of the borrower to return the thing borrowed; a demand must be shown. *Ross v. Clark*, 549.

BREACH OF PROMISE OF MARRIAGE.

1. A petition, in an action for breach of promise of marriage, alleging that about a certain specified date, "the defendant—in consideration that the plaintiff, then being sole and unmarried, at the request of the defendant, faithfully promised to marry the defendant—did then and there undertake and faithfully promise to marry the plaintiff; that, confiding in the said promise and undertaking of said defendant, plaintiff has remained and continued and still is sole and unmarried, and has always been and still is ready and willing to marry the defendant; that though a reasonable time has elapsed since said promise and undertaking for the defendant to marry plaintiff, and although requested so to do, he has wholly neglected and refused, and still does neglect and refuse," &c., is good after verdict on motion in arrest of judgment. *Davis v. Slagle*, 600.
2. Where a defendant, in an action for breach of promise of marriage, attempts in his answer to justify his noncompliance with his contract by charging that the character of the plaintiff for virtue is bad, the fact that this imputation is unwarrantably made is a circumstance that aggravates the damages; and the jury may take the same into consideration in estimating the damages. *Id.*

CARONDELET.

See LANDS AND LAND TITLES.

CERTIFICATE OF PROOF OF DEEDS.

See CONVEYANCE, 8.

CERTIORARI.

1. *Quere*, when may writs of *certiorari* issue from the supreme court, and what is the proper office and function of such writs? *Hannibal & St. St. Joseph Railroad Co. v. Morton*, 817.

CHANCERY PRACTICE.

See EQUITY, 5. PRACTICE, 52.

CHARTER.

See CORPORATION. CONDEMNATION AND APPROPRIATION TO PUBLIC USES.

CHILD.

See PARENT AND CHILD.

CLERICAL ERROR.

See CRIMES AND PUNISHMENTS, 10.

COLLISION.

See BOATS AND VESSELS.

1. If, in a case of collision, both parties are in fault and the fault or negligence of each contributes to the injuries received, neither party can be made to respond to the other. This doctrine does not, however, apply to a case in which the fault or negligence of the party seeking a recovery contributes only remotely and indirectly to the injury complained of. *Adams v. Wiggins Ferry Co.*, 95.
2. If both parties actively contribute to the injury at the time of its commission, there can be no recovery by either; where, however, the fault or negligence of one party is merely passive, as where his wrong consists in mooring his boat in a prohibited place at a wharf, he may recover for an injury arising from a collision if the other party does not exercise ordinary care and prudence. *Id.*

COMITY.

See INSOLVENT LAWS.

COMMON.

See LANDS AND LAND TITLES.

1. Under the act of December 22, 1824, (R. C. 1825, p. 211,) the trustees of the town of St. Charles had power to lease the common of the town. *McDonald v. Schneider*, 405.
2. It is not sufficient to invalidate such a lease that it was executed in the name of the trustees of the town and not in the name of "The inhabitants of the town of St. Charles"—the corporate name of the town. *Id.*
3. *Quere*, can Carondelet be shown to have title to land as common under the statute of limitation? *Primm v. Haren*, 205.
4. The United States survey of Carondelet common includes private claims; hence, it would be erroneous to rule that twenty years' claim and user as common, by the inhabitants of Carondelet, of the land embraced in said survey would bar the right of a private claimant who

COMMON—(Continued.)

seeks to recover possession of land embraced in said survey as confirmed to him by act of Congress of June 13, 1812. *Id.*

5. The recorder of land titles was not authorized by the act of Congress of May 26, 1824, to take proof in relation to the extent and boundaries of common confirmed to a village by the act of Congress of June 13, 1812; consequently, a certificate of confirmation of common issued by him would not be evidence of title thereto. *Id.*

COMMON CARRIER.

See BAILMENT.

1. Where one of several companies engaged in transporting goods on the line of a route between two distant points receives goods from another of those companies, and, in accordance with the usual custom in such cases and in ignorance of any special contract made with the company first receiving the goods, pays the freight and charges demanded at the point where they are so received and transports them to their place of destination: *Held*, there being no arrangement or understanding between the companies with reference to "through" transportation, that the company might retain possession of the goods until the consignee should pay its own customary charges for transportation, together with the freight and charges paid by it on its receipt of the goods, although such sum should exceed the amount for which the company that first received the goods agreed they should be transported. *Wells v. Thomas*, 17.
2. Where the rate of freight inserted in a dray ticket is "30 cents per hundred" and the clerk of a steamboat signs the same by mistake or oversight, and the shipper of the goods at the time he puts the same on board for transportation has no knowledge of the mistake, and when it is discovered refuses to pay a higher rate of freight and demands his goods of the boat, and its officers fail to re-deliver the same, and transport them to their place of destination, they will not be entitled to demand in behalf of the boat more than 30 cents per hundred. *Wood v. Steamboat Fleetwood*, 159.
3. Where there is a privilege of reshipping reserved in a bill of lading, the carrier will be liable for any loss occurring on the boat on which the goods are reshipped, if under like circumstances he would have been liable had the loss occurred on his own boat. *Carr v. Steamboat Michigan*, 196.
4. The reservation in a bill of lading of the "privilege of reshipping" confers only the right of transferring the goods shipped to another boat or vessel for the purpose of being transported to the port of destination; it will not authorize the temporary storing of the goods on a wharf-boat at the point of reshipment; nor will the carrier, in order to escape liability for the loss of the goods while stored on a wharf-boat at Cairo with a view to reshipment to St. Louis, be permitted to show that "the usual and customary mode of reshipping was to place the cargo on wharf-boats at Cairo, to be taken therefrom by other boats bound for St. Louis." *Id.*

COMMON CARRIER—(*Continued.*)

5. The liability of warehousemen and forwarding agents is different from that of common carriers; they are responsible only for losses occasioned by their fault or negligence. *Holtzclaw v. Duff*, 392.
6. Where a common carrier engages to carry goods to a certain point, the terminus of the road, and there to deliver them on board a steamboat, the liability of a common carrier continues only until the arrival of the goods at the terminus of the road, and the liability of a warehouseman and forwarding agent then commences; if the goods are damaged while deposited on the levee awaiting the arrival of a steamboat, the owner can recover only for loss occasioned by negligence. *Id.*

CONDEMNATION AND APPROPRIATION TO PUBLIC USES.

1. Where, in proceedings instituted in behalf of the Hannibal and St. Joseph Railroad Company, under its charter, to obtain the condemnation and appropriation of land upon which said railroad had been located, it was stated, in the report of the viewers appointed to assess the damages, that before proceeding to examine the damages they took the oath prescribed by the statute, but the oath itself was not set forth; held, it not appearing that any objection was made to the report on this ground, that the recital in the report was sufficient to show that the required oath had been taken. *Hannibal & St. Joseph Railroad Co. v. Morton*, 317.
2. The supreme court would not in such case quash the proceedings for the reason that the record thereof does not show affirmatively that the viewers were citizens of the county. *Id.*
3. The charter of the company not making any provision for bills of exceptions in such cases, they could not be taken; if taken, they would form no part of the record. *Id.*
4. The supreme court could not, in such case, quash the proceedings on the ground that the damages allowed by the commissioners were inadequate. *Id.*
5. Private property can not constitutionally be condemned and appropriated by the legislature to private use. *Dickey v. Tennison*, 373.
4. The "act to establish a neighborhood road in Washington county, approved December 8, 1855, (Sess. Acts, 1855, p. 466,) is unconstitutional. *Id.*
7. Proceedings, instituted under an act of the legislature for the condemnation and appropriation of private property, commenced without notice to the owner thereof, are void. *Id.*

CONDITIONAL SALE.

See MORTGAGE. VENDORS AND PURCHASERS.

1. The test by which to determine whether a transaction is a mortgage or a conditional sale is this: if the relation of debtor and creditor remains and a debt still subsists between the parties, it is a mortgage; if, however, there is no debt still subsisting, and the grantor has the privilege of refunding if he pleases by a given time and thereby entitling himself to a reconveyance, it is a conditional sale. *Slowe v. McMurray*, 113.

CONDITIONAL SALE—(*Continued.*)

2. If the transaction is a conditional sale, the party seeking a reconveyance to himself must strictly comply with the conditions imposed upon him.
3. A. purchased certain real estate in his own name and with his own money; at the date of the purchase he agreed with B. that if B. would before a certain specified time pay one-half of the purchase money he should be entitled to one-half of the land; *held*, that A., not paying any portion of the purchase money, had no interest, legal or equitable, in the land; that the contract of B. with A. was within the statute of frauds. *Clawwater v. Tetherow*, 241.

CONDITIONS.

See AGREEMENT. INSURANCE.

CONDONATION.

See DIVORCE.

1. After a husband or wife has been wronged in such a manner as would warrant a divorce, if he or she voluntarily cohabits with the other party, it is a condonation of the offence. *Twyman v. Twyman*, 383.

CONFIRMATIONS.

See LANDS AND LAND TITLES.

CONSTABLE.

1. A justice of the peace, under section 21 of the second article of the attachment act of 1845 (R. C. 1845, p. 151), ordered the sale of a wood-boat in the custody of a constable under a writ of attachment issued by said justice. *Held*, that, on a final determination of the attachment suit adversely to the plaintiff therein, the defendant would be entitled to the entire proceeds of the sale of the boat, and might recover the same from the constable, although no order had been made by the justice with respect thereto. *Snead v. Wegman*, 176.
2. Any sum that might be allowed the constable, under section 45 of the second article of the attachment act of 1845, as compensation for his trouble and expense in keeping the boat, should be taxed as costs in the cause and would fall on the unsuccessful party; the constable would not have a lien on the proceeds of the sale of the boat for the necessary expenses of keeping and selling it. *Id.*
3. Only the interest of the defendant in the attachment could be attached and sold; hence he alone could sue the constable for the proceeds of the sale of the boat. *Id.*
4. Where a constable wrongfully levies an execution upon property exempt by law from execution, relief can be had, upon his official bond, against him and his securities, only by action thereon in the name of the state; the 23d and 28th sections of the eighth article of the act concerning justices' courts do not furnish a summary remedy in such case. (R. C. 1855, p. 968.) *Miller v. Wall*, 440.

CONSTITUTIONAL LAW.

See BOATS AND VESSELS, 3.

1. It is no infringement of that provision of the constitution giving the accused the right in all criminal prosecutions to meet the witnesses

CONSTITUTIONAL LAW—(Continued.)

against him face to face to receive in evidence, against the defendant in a criminal prosecution, a deposition taken before the committing magistrate in the presence of the accused—the deponent being dead at the time of trial. *The State v Harman*, 120.

2. So long as goods imported into one of the United States from a foreign country remain in the original unbroken package, the importer may sell the same, in that form, without first taking out a license from the state authorities; a state law requiring him first to take out a license would be in conflict with the constitution of the United States. *The State v. Shapleigh*, 344.
3. The act to tax and license merchants, approved December 11, 1855 (R. C. 1855, p. 1072), does not, when properly construed, require the importer of foreign goods to take out a license to authorize him to sell the same in the original packages. *Id.*
4. Private property can not constitutionally be condemned and appropriated by the legislature to private use. *Dickey v. Tennison*, 373.
5. The "act to establish a neighborhood road in Washington county," approved December 8, 1855, (Sess. Acts, 1855, p. 466,) is unconstitutional. *Id.*
6. Proceedings, instituted under an act of the legislature for the condemnation and appropriation of private property, commenced without notice to the owner thereof, is void. *Id.*
7. No state has power, under the constitution of the United States, in the exercise of its taxing power, to discriminate in favor of its own manufactures and productions and against those of its sister states. Such a discriminating tax, whether levied on the goods and manufactures of sister states in the original unbroken bale or package in which they are brought into the state, or upon the same after they have become incorporated into the mass of property of the state, would be unconstitutional and void. *The State v. North & Scott*, 464.
8. As a state can not, by a direct tax on the manufactures and productions of sister states, discriminate against them, so it can not accomplish such a result indirectly by requiring a merchant dealing in such manufactures to take out a license and pay a tax thereon, while it levies no such tax upon merchants dealing in articles of its own manufacture and growth. *Id.*
9. The act to tax and license merchants, approved December 11, 1855, (R. C. 1855, p. 1072), so far as the same required merchants dealing in the manufactures of sister states to take out licenses from the state authorities and to pay a tax on the same, is unconstitutional and void. (NAPTON, Judge, dissenting.) *Id.*
10. A state law requiring an importer of foreign goods, who sells the same in the original unbroken package, to take out a license from the state authorities and to pay a tax on the same, would be unconstitutional. *Id.*
11. The provision of the constitution of the state of Missouri which declares that all property subject to taxation shall be taxed in proportion to its value does not require that all the property in the state shall be

CONSTITUTIONAL LAW—(Continued.)

- taxed, but that when any species of property is selected for taxation it shall be taxed in proportion to its value. *Id.*
12. That provision of the constitution of the state of Missouri, which requires all property subject to taxation to be taxed in proportion to its value, is applicable only to taxation in its usual, ordinary and received sense, to taxation for general state, county, city and town purposes, not to local assessments, where the money raised is expended on the property taxed. *Egyptian Levee Co. v. Hardin*, 495.
 13. The act of February 27, 1855, (Sess. Acts, 1855, p. 73; also Adj. Sess. 1855, p. 28,) authorizing the Egyptian Levee Company, thereby incorporated, for the purpose of reclaiming a certain district from inundation by leveeing, ditching and embanking, to levy a tax *per acre* (not exceeding fifty cents) upon the land owners within said district, is constitutional; it is not in conflict with that provision of the constitution requiring that all property subject to taxation shall be taxed in proportion to its value. *Id.*

CONSTRUCTION.

See AGREEMENT. INSURANCE. CONVEYANCE. ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

CONVEYANCE.

See LAND AND LAND TITLES. EVIDENCE.

1. The doctrine of presuming conveyances rests mainly upon long and uninterrupted possession in the owners of the title in favor of which the presumption is indulged; if this possession be had, not under the title in favor of which such a presumption is invoked, but under another title not shown to be owned by the person so invoking it, a conveyance will not be presumed to supply the defect. *Dessaunier v. Murphy*, 48.
2. Where a plaintiff in an action of ejectment bases his right to recover upon a title acquired by an adverse possession for twenty years, it is not necessary that his possession, or that of those under whom he claims, should be connected with the possession of previous occupants by instruments in writing; the continuity of the possession may be shown by any testimony that is legitimate and pertinent. *Menkens v. Blumenthal*, 198.
3. A deed conveyed all the interest of the grantor in his father's estate or lands "near St. Louis;" *held*, that it might be shown that the father possessed land nearer St. Louis, and more appropriately within the description of the deed of the son, than that sought to be comprised within it. *Id.*
4. Where the possession of land by a party in whose favor it is sought to invoke the presumption of a deed is entirely consistent with title in another—as where a father (in whose behalf the presumption is invoked as against his son and the son's heirs) is in possession of land during the minority of the son, or after the death of the son, at which time the law devolved a life interest in the land of the son upon the father—such possession will not authorize the presumption of a conveyance. *Watson v. Bissell*, 220.

CONVEYANCE—(Continued.)

5. Under the general law of the state certified copies of deeds of conveyance may be received in evidence upon proof that the originals are not "within the power" of the party offering such copies—that is, not within his control or possession, nor in the possession of his agent, servant or bailee. *Barton v. Murrain*, 235.
6. Where, however, deeds conveying portions of the military bounty land in this state are executed in other states of the Union, and acknowledged and proved in accordance with the laws and usages of such states and not in accordance with the law of this state, certified copies of such deeds can be read in evidence only upon proof of the loss or destruction of the original. *Id.*
7. The loss of such instruments should be presumed if it appear that search has been made in the proper places and by the proper persons, and that they can not be found after due diligence has been used in looking for them. *Id.*
8. The record of a deed not acknowledged or proved according to the law in force at the time such record was made, imparts notice to all persons of the contents of such deed. (See R. C. 1855, p. 731; Sess. Acts, 1847, p. 95.) *Allen v. Moss*, 354.
9. Under the act of July 3, 1807, (1 Terr. Laws, p. 120, § 45,) a sheriff's deed unacknowledged in court was ineffectual to pass the title to the purchaser; the authority of the sheriff being statutory, it should have been strictly pursued. *Id.*
10. Where a deed of conveyance purports to have been executed by making a mark or cross and has been attested in the same manner, the 27th section of the act of March 25th, 1845, (R. C. 1845, p. 223,) did not authorize the granting of a certificate of proof of such a deed. *Id.*
11. Where there is a palpable omission in the description of a deed, it may be supplied by construction. *Hoffman v. Reihl*, 554.
12. In the absence of calls for specific objects or other controlling calls, the course will control. *Id.*
13. Where a party's acts are given in evidence, he may give in evidence, in rebuttal, other acts which are a part of, or connected with and explanatory of, those previously used against him. *Blair v. Marks*, 579.

CORPORATION.

1. The old Bank of Missouri, having accepted the provisions of the act regulating banks and banking institutions, &c. (see Sess. Acts, 1857, p. 14) established, as required by the 12th section of the 10th article of said act, a branch bank at Palmyra, in Marion county, and furnished to it a capital of \$62,500. The parent bank appointed all the directors, nine in number, there being no private subscription of stock at the time. Afterwards, books of subscription were opened at Palmyra, and \$62,500 in stock were subscribed; some of these shares were forfeited and only \$33,660 were paid in on the stock subscribed. The parent bank, claiming under these circumstances the right to appoint six out of the nine directors, ordered an election for the three remaining directors on the 1st of March, 1858. The directors of the branch bank also resolved that an election should be held for three directors on said day,

CORPORATION—(Continued.)

- and notice was given to that effect. An election was accordingly held and a large majority of the stockholders voted for five directors instead of three; a small minority voted for three persons as directors. The latter were declared duly elected. *Held*, 1st, that under such circumstances the parent bank was authorized, by the 15th section of the 10th chapter of said act above referred to, to appoint six of the directors, and that the private stockholders were entitled to appoint no more than three; that the furnishing of capital, within the meaning of said section, is not the subscribing of stock merely, but the payment of the same; 2d, that the election being legally an election for three directors only, the votes given for five directors were illegal and were properly disregarded, and the three directors voted for were properly declared elected. *The State, ex rel., v. Thompson*, 365.
2. Under the act of December 22, 1824, (R. C. 1825, p. 211,) the trustees of the town of St. Charles had power to lease the common of the town. *McDonald v. Schneider*, 405.
 3. It is not sufficient to invalidate such a lease that it was executed in the name of the trustees of the town and not in the name of "The inhabitants of the town of St. Charles"—the corporate name of the town. *Id.*

COSTS.

1. In retaxing the costs in a cause, if the fees are not legally chargeable they will be disallowed; if the fee-bill on its face is illegal, it must be rejected; but if the charges are such as may have been legally incurred in the prosecution or defence of the action, the fee-bill will be taken to be *prima facie* correct, and the burden of showing its incorrectness is on him who objects to it. *The State v. McO'Brien*, 508.

COUNTY COURTS.

See ADMINISTRATION. PRACTICE, 26. RECOGNIZANCE.

1. The general appellate jurisdiction that the circuit courts exercise over the county courts does not authorize them to try *de novo* causes appealed from the county courts. *Lacy v. Williams*, 280.
2. Curators of the estates of minors can not be appointed by the county courts of counties in which such children do not reside. *Id.*
3. An appeal will lie to a circuit court from an order of a county court removing the guardian of an insane person. *Hall v. Audrain County Court*, 329.
4. In perfecting such an appeal, an affidavit and appeal bond or recognizance are not required. *Id.*
5. A mandamus will lie in such case from the circuit court to the county court requiring it to grant an appeal, although a writ of error might have been resorted to. *Id.*

COURT.

See COUNTY COURTS. EVIDENCE, 5.

COVENANT.

See RELEASE.

1. A covenant not to sue one of several persons jointly liable will not discharge the others. *Carondelet v. Desnoyer's Adm'r*, 36.

CREDITORS.

See FRAUD AND FRAUDULENT CONVEYANCES. ASSIGNMENTS FOR THE BENEFIT OF CREDITORS.

CRIMES AND PUNISHMENTS.

See CONSTITUTIONAL LAW.

1. J. D. and M. G. were jointly indicted for a felonious assault upon one C. H. The indictment charged that they in and upon one C. H. "feloniously and wilfully did make an assault, with a certain knife of the length, &c., which they the said J. D. and M. G. then and there in their right hand had and held, with the intent then and there him, the said C. H., with the knife aforesaid, wilfully and feloniously to kill, against," &c. *Held*, that the indictment was sufficient to sustain a conviction thereon. *State v. Dalton*, 13.
2. Evidence of character, to be admissible, must be restricted to that trait of character in issue. *Id.*
3. An indictment, founded on section 1 of the act regulating dram-shops, charging that the defendant, on, &c., at, &c., sold intoxicating liquors, to-wit, one quart of whisky, "without having any license for that purpose continuing in force during all that time authorizing him so to do," &c., is sufficient; it sufficiently negatives any legal authority on the part of defendant to sell intoxicating liquors. *The State v. Gregory*, 231.
4. An indictment founded on the 36th section of the 8th article of the act concerning crimes and punishments (R. C. 1855, p. 631) charging that the defendant, on, &c., at, &c., "did then and there unlawfully keep open a grocery by then and there permitting persons to enter said grocery and then and there to drink intoxicating liquors," is good. *The State v. Crabtree*, 232.
5. To authorize the conviction of a grocery-keeper on such an indictment, it is not sufficient that he permits persons to enter his grocery on Sunday and to drink intoxicating liquors there; it must appear that the acts done by him are done for the accommodation of customers and in continuation of the usual business of the week. *Id.*
6. If one having a gun in his hands raises it to a level and directs it towards, but not directly at, another, and threatens to kill him if he advances in a certain direction, it will constitute an assault; it is not necessary that the gun should be raised to the shoulder. *The State v. Epperson*, 255.
7. Each act of selling liquor without license is a distinct offence for which the party so doing may be prosecuted by a separate indictment or by different counts in the same indictment; when the defendant pleads that the offence charged against him is the same of which he had been previously convicted, the onus is on him to sustain his plea; it is not sufficient for him to show that the evidence adduced against him would have supported the first indictment because it would have been sustained by proof of any act of selling within twelve months before the finding thereof. *The State v. Andrews*, 267.
8. In all cases in which a person arraigned upon an indictment does not confess the indictment to be true, a plea of not guilty should be entered,

CRIMES AND PUNISHMENTS—(Continued.)

- and the same proceedings should be had as if he had formally pleaded not guilty to the indictment. (R. C. 1855, p. 1181, § 5.) *Id.*
9. In the case of a conviction for an offence not capital, an omission to enter of record the *allocution*, or formal address of the judge to the prisoner asking him if he has any thing to say why sentence should not be pronounced against him, is not of itself fatal. *The State v. Ball*, 324.
 10. In the entry of the empannelling of a jury, the jury were stated to be "twelve good and lawful men," and their names were given, but the same name was inserted twice, making thirteen in all; *held*, that this was merely a clerical error. *Id.*
 11. An affirmative verdict, in response to an indictment for murder in the first degree, of "guilty of murder in the second degree, in manner and form as charged," &c., is by implication an acquittal of murder in the first degree, and, so long as it stands, it is a bar to any prosecution for the higher grade of offence. *Id.*
 12. In a capital case, the defendant must be present at the time of the rendition of the verdict; and the record must affirmatively show his presence. *The State v. Cross*, 332.
 13. Drunkenness does not mitigate a crime; nor can it be taken into consideration by a jury in determining whether a person committing a homicide acted thereon wilfully, deliberately and premeditatedly so as to constitute the crime committed murder in the first degree. (RICHARDSON, Judge, dissents from this doctrine, holding that, although a homicide committed wilfully, deliberately and premeditatedly is in no way mitigated or excused by drunkenness, yet, since the quality and grade of the offence depend upon the state of mind of the accused at the time of the commission of the alleged crime, his drunkenness may be taken into consideration by the jury in determining whether the killing was done wilfully, deliberately and premeditatedly.) *Id.*
 14. The law presumes the innocence, not the guilt, of an accused person; it is error to instruct a jury that in order to find a verdict of guilty it is not necessary that they should be satisfied of the defendant's guilt to the exclusion of a reasonable doubt, but that if they believe from the evidence that the defendant is guilty they should so find, although they may entertain a reasonable doubt. *The State v. Fugate*, 535.
 15. To constitute murder in the first degree, the act of killing must be intentional, and done without justifiable cause. *The State v. Hicks*, 588.
 16. Where a homicide is committed under circumstances that leave it in doubt whether the act was committed maliciously or from an apprehension of real danger, the jury may consider the fact that the deceased was of a rash, turbulent and violent disposition in determining whether the accused had reasonable cause to apprehend great personal injury to himself. *Id.*
 17. An indictment, under section 30 of article 8 of the act concerning crimes and punishments (R. C. 1855, p. 630), charging that the defendants unlawfully did disturb a congregation and assembly of people met for

CRIMES AND PUNISHMENTS—(Continued.)

religious worship, by wilfully behaving in a rude and indecent manner and using profane discourse within the place of worship of said congregation, is bad; the offence should be charged to have been done wilfully, maliciously or contemptuously. *The State v. Hopper*, 599.

CROP.

See WILLS AND TESTAMENTS.

CURATORS.

1. Curators of the estates of minors can not be appointed by the county courts of counties in which such children do not reside. *Lacy v. Williams*, 280.

CUSTOM.

See COMMON CARRIER.

D

DAMAGES.

1. To warrant a jury in giving exemplary damages, in an action of trespass, it is not necessary to show that the defendant was prompted by ill will and hostility toward the plaintiff. *Goetz v. Ambs*, 28.
2. If an injury to the person be committed unintentionally and result simply from a want of care, the damages awarded should be compensatory; if it be wilful and intentional, exemplary damages may be allowed. *Id.*
3. Verdicts of juries should not be set aside on the ground that the damages allowed are excessive, unless they are so extravagant as to bear evident marks of prejudice, passion or corruption. *Id.*
4. Where a person hires a slave for a year and the said slave is wrongfully taken out of his possession during the term of service, the measure of damages in a suit against the wrongdoer is the value of the services of the slave during the residue of the term, even though the suit should be instituted before the expiration of such term. *Moore v. Winter*, 380.
5. If, however, services are rendered by him which are of value to the person with whom he contracts and are accepted by such person, an obligation is thereby created to pay the reasonable value of such services, not exceeding the contract price, taking into consideration and making allowance for any damage resulting from the breach of the contract. *Id.*
6. If a minor enter into a special contract to do certain work, he may avoid such contract and may recover a reasonable compensation for the work done, the damage resulting from the avoiding of the contract being taken into consideration and allowed. *Id.*
7. Where an employee, wrongfully discharged before the completion of his term of service, brings an action, before the expiration of such term, to recover damages for the breach of the contract, it is error to rule that the measure of damages is the contract price of his services for the whole term. *Ream v. Watkins*, 516.

DAMAGES—(Continued.)

8. Where in a submission to arbitration the matter in dispute is stated to be the "taking of a quantity of timber from the land" of the plaintiffs, the arbitrators would not be authorized to assess treble damages. *Frissell v. Fickes*, 557.
9. Where a defendant, in an action for breach of promise of marriage, attempts in his answer to justify his noncompliance with his contract by charging that the character of the plaintiff for virtue is bad, the fact that this imputation is unwarrantably made is a circumstance that aggravates the damages; and the jury may take the same into consideration in estimating the damages. *Davis v. Slagle*, 600.

DEDICATION TO THE PUBLIC.

1. A clear intention to dedicate is necessary to constitute a dedication of land to the public. *Missouri Blind Institute v. How*, 211.
2. To authorize the presumption of an intention to dedicate land to the public as a street, there must be either an acquiescence by the owner for twenty years in the free use and enjoyment of such land as a public street, or such clear, unequivocal and decisive acts as will amount to an explicit manifestation of his will to make a permanent abandonment and dedication thereof to the public. *Id.*
3. When user alone, disconnected with any act of the owner showing an intention to dedicate, is relied on as evidence of a dedication of a right of way to the public, it must continue the length of time necessary to bar an action to recover the possession of land; the same length of time of nonuser would, it would seem, be necessary to raise a presumption of abandonment by the public. *State v. Young*, 259.

DEED.

See CONVEYANCE.

DEMAND.

See BAILMENT.

DEPOSITION.

1. Where a party to a suit, through no negligence on his part, but through reliance upon the promises of a notary before whom a deposition is being taken, and of the opposing counsel, is prevented from cross-examining the witness, the deposition should be suppressed. *Dannefelser v. Weigel*, 45.

DESCENTS AND DISTRIBUTIONS.

1. On the death of a husband without children, the increase of a female slave, that came to the husband in right of the marriage, remaining undisposed of at his death, passed, under the dower act of 1845 (R. C. 1845, p. 430, § 3), with the mother to the widow. *Herdon v. Herndon's Adm'r*, 421.

DEVISE.

See WILLS AND TESTAMENTS.

DIRECTORS.

See CORPORATION, 1. ELECTION.

DISCHARGE.

See **INSOLVENT LAWS.**

DISSEIZIN.

See **FORCIBLE ENTRY AND DETAINER, 3.**

DISTURBANCE OF PUBLIC WORSHIP.

See **CRIMES AND PUNISHMENTS.**

DIVORCE.

See **MARRIAGE.**

1. After a husband or wife has been wronged in such a manner as would warrant a divorce, if he or she voluntarily cohabits with the other party, it is a condonation of the offence. *Twyman v. Twyman*, 388.
2. The admissions of a party to a proceeding for divorce are evidence against him, but alone they are not sufficient to warrant a decree; they must be supported by other evidence. *Id.*

DOMICIL.

1. Generally, the domicil of the parent is the domicil of the minor child. *Lacy v. Williams*, 280.

DOWER.

1. On the death of a husband without children, the increase of a female slave, that came to the husband in right of the marriage, remaining undisposed of at his death, passed, under the dower act of 1845 (R. C. 1845, p. 430, § 3), with the mother to the widow. *Herndon v. Herndon's Adm'r*, 421.

DRAY TICKET.

See **COMMON CARRIER.**

DRUNKENNESS.

1. Drunkenness does not mitigate a crime; nor can it be taken into consideration by a jury in determining whether a person committing a homicide acted thereon wilfully, deliberately and premeditatedly so as to constitute the crime committed murder in the first degree. (RICHARDSON, Judge, dissents from this doctrine, holding that, although a homicide committed wilfully, deliberately and premeditatedly is in no way mitigated or excused by drunkenness, yet, since the quality and grade of the offence depend upon the state of mind of the accused at the time of the commission of the alleged crime, his drunkenness may be taken into consideration by the jury in determining whether the killing was done wilfully, deliberately and premeditatedly.) *The State v. Cross*, 532.

E**EASEMENT.**

1. A clear intention to dedicate is necessary to constitute a dedication of land to the public. *Missouri Blind Institute v. How*, 211.
2. To authorize the presumption of an intention to dedicate land to the public as a street, there must be either an acquiescence by the owner

EASEMENT—(*Continued.*)

for twenty years in the free use and enjoyment of such land as a public street, or such clear, unequivocal and decisive acts as will amount to an explicit manifestation of his will to make a permanent abandonment and dedication thereof to the public. *Id.*

EJECTMENT.

See LIMITATION.

1. Where a plaintiff in an action of ejectment bases his right to recover upon a title acquired by an adverse possession for twenty years, it is not necessary that his possession, or that of those under whom he claims, should be connected with the possession of previous occupants by instruments in writing; the continuity of the possession may be shown by any testimony that is legitimate and pertinent. *Menkens v. Blumenthal*, 198.
2. Where, in an action of ejectment, the person from or through whom the defendant claims title to the premises has, on motion of the defendant, been made a co-defendant, the plaintiff is not entitled to dismiss the suit as to such co-defendant. *Hayden v. Stewart*, 286.
3. Under the practice act of 1849 an equitable defence might be made to an action of ejectment. *Id.*
4. In an action of unlawful detainer the merits of the title can in nowise be inquired into; it is immaterial whether the intruder is a naked trespasser or enters under a paramount title; the purchaser at a sheriff's sale under an execution is put to his ejectment if the defendant refuse to yield possession. *Spalding v. Mayhall*, 377.
5. In order that a defendant may defeat a recovery in an action of ejectment by showing an outstanding title in a third person, such outstanding title so set up must be a present, subsisting and operative title, such an one as the owner thereof could recover on if he were asserting it in an action. *McDonald v. Schneider*, 405.
6. Possession of land is presumed to be in the true owner. Being presumed to be in the possession of the whole, another entering upon him, whether under color of title or not, can acquire title as against him, under the statute of limitations, only to such portion as is actually occupied by him for twenty years adversely to the true owner; he is confined to his actual adverse possession, and the burden is on him to show such actual adverse possession and its extent. *Id.*
7. Actual possession of part of a tract of land under claim and color of title to the whole is constructive possession of the whole as against all persons not having title; as against such person in possession of part, the constructive possession of the residue would be in the true owner. *Griffith v. Schwendeman*, 412.
8. Possession of a parcel that has been occupied for twenty years can not be connected with the possession for a shorter period of another tract so as to bring the latter within the operation of the statute of limitations. *Id.*

ELECTION.

1. The old Bank of Missouri, having accepted the provisions of the act regulating banks and banking institutions, &c. (see Sess. Acts, 1857,

ELECTION—(Continued.)

p. 14) established, as required by the 12th section of the 10th article of said act, a branch bank at Palmyra, in Marion county, and furnished to it a capital of \$62,500. The parent bank appointed all the directors, nine in number, there being no private subscription of stock at the time. Afterwards, books of subscription were opened at Palmyra, and \$62,500 in stock were subscribed; some of these shares were forfeited and only \$33,600 were paid in on the stock subscribed. The parent bank, claiming under these circumstances the right to appoint six out of the nine directors, ordered an election for the three remaining directors on the 1st of March, 1858. The directors of the branch bank also resolved that an election should be held for three directors on said day, and notice was given to that effect. An election was accordingly held and a large majority of the stockholders voted for five directors instead of three; a small minority voted for three persons as directors. The latter were declared duly elected. *Held*, 1st, that under such circumstance the parent bank was authorized, by the 15th section of the 10th chapter of said act above referred to, to appoint six of the directors, and that the private stockholders were entitled to appoint no more than three; that the furnishing of capital, within the meaning of said section, is not the subscribing of stock merely, but the payment of the same; 2d, that the election being legally an election for three directors only, the votes given for five directors were illegal and were properly disregarded, and the three directors voted for were properly declared elected. *The State, ex rel., v. Thompson*, 365.

EMINENT DOMAIN.

See CONDEMNATION AND APPROPRIATION TO PUBLIC USES.

ESTOPPEL.

1. A division line mistakenly located and agreed upon by adjoining proprietors will not be held binding and conclusive upon them if no injustice be done by disregarding it. *Menkens v. Blumenthal*, 198.

EQUITY.

See INJUNCTION. MISTAKE. MORTGAGE, 1, 2.

1. An agreement to refer a matter in dispute to arbitrators can not be specifically enforced. *King v. Howard*, 21.
2. A. purchased certain leasehold premises with a saw-mill thereon, which were subject at the time of his purchase to a deed of trust made to secure certain promissory notes. A., at the time of his purchase, had notice of the existence of this deed and supposed it to be a valid encumbrance upon the property. In point of fact the notes and deed of trust were procured by fraud. After A.'s purchase the trustee under the deed of trust advertised the premises for sale and proceeded to sell the same, and at the sale the premises were struck off to one K. as the highest bidder. K. acted as the agent of A. and made the purchase for his benefit. Both A. and K. acted in ignorance of the fraud in procuring the notes and deed of trust. The trustee refused to execute a deed to K. and re-advertised the premises for sale under the deed of trust. K.,

EQUITY—(Continued.)

acting for the benefit of A. and with a bond of indemnity from him, procured a temporary injunction enjoining the sale, A. becoming his surety on his injunction bond. This injunction was afterwards dissolved. In the meantime the saw-mill had burned down during the pendency of the injunction proceedings and previous to the dissolution of the injunction. The damages awarded to the defendants on the dissolution of the injunction were the full amount of the notes, with interest, &c.; which were paid by A. to the person who had originally procured by fraud the execution of the notes and deed of trust. Until after the termination of the injunction proceedings A. supposed that the deed of trust was a valid encumbrance. *Held*, that A., not being the party defrauded, was not entitled to recover back the amount so paid by him. *Magwire v. Hall's Adm'r*, 146.

3. A sheriff's deed must be under seal; if not sealed, a court of equity can not aid its imperfect execution; nor should a court presume such a deed to be sealed against the express admission, in an answer, of the party invoking such a presumption, that the sheriff omitted by mistake to seal the deed. *Moreau v. Branham*, 351.
4. Where there has been a part performance of a parol contract for the purchase of land, and the vendor puts it out of his power to specifically perform his contract by selling the land to a *bona fide* purchaser without notice, although there would be no remedy by action at law for damages inasmuch as the contract is by parol, equity will entertain jurisdiction of a bill for compensation. *Lee v. Howe*, 521.
5. By the rules of chancery practice in force prior to the passage of the practice act of 1848, bills of exceptions were as necessary as in common law suits. *Madden's Heirs v. Madden's Adm'r*, 544.
6. Whether an administrator shall be charged with interest on money in his hands belonging to his intestate's estate is to be determined by the circumstances of each case; he is not to be so charged as a matter of course. *Id.*

EVIDENCE.

See LANDS AND LAND TITLES, 2, 3. LIMITATION, 8. ADMINISTRATION. PRIVILEGED COMMUNICATIONS. MORTGAGE. CRIMES AND PUNISHMENTS. PARTITION, 7. CONVEYANCE, 3, 8, 9, 10.

1. Evidence of character, to be admissible, must be restricted to that trait of character in issue. *State v. Dalton*, 13.
2. The fact that a defendant is present in court, during the trial of the cause in obedience to a subpoena, ready to testify when called, will not render it improper to receive in evidence a deposition of said defendant taken in another cause in which he was a party; though not admissible as a deposition, it may, being signed by him, be received as a written admission. *Charleson v. Hunt*, 34.
3. The doctrine of presuming conveyances rests mainly upon long and uninterrupted possession in the owners of the title in favor of which the presumption is indulged; if this possession be had, not under the title in favor of which such a presumption is invoked, but under an-

EVIDENCE—(Continued.)

- other title not shown to be owned by the person so invoking it, a conveyance will not be presumed to supply the defect. *Dessaunier v. Murphy*, 48.
4. It is no infringement of that provision of the constitution giving the accused the right in all criminal prosecutions to meet the witnesses against him face to face, to receive in evidence, against the defendant in a criminal prosecution, a deposition taken before the committing magistrate in the presence of the accused—the deponent being dead at the time of trial. *The State v. Harman*, 120.
 5. It is the province of the court to construe written instruments; where, however, they are adduced as containing evidence of facts, the jury are authorized to draw such inferences from them as they may deem warranted. *Pimm v. Haren*, 205.
 6. The recorder of land titles was not authorized by the act of Congress of May 26, 1824, to take proof in relation to the extent and boundaries of common confirmed to a village by the act of Congress of June 13, 1812; consequently, a certificate of confirmation of common issued by him would not be evidence of title thereto. *Id.*
 7. Where the possession of land by a party in whose favor it is sought to invoke the presumption of a deed is entirely consistent with title in another—as where a father (in whose behalf the presumption is invoked as against his son and the son's heirs) is in possession of land during the minority of the son, or after the death of the son, at which time the law devolved a life interest in the land of the son upon the father—such possession will not authorize the presumption of a conveyance. *Watson v. Bissell*, 220.
 8. Declarations of a person in possession of land as a life tenant can not be received in evidence to elevate his life estate into an estate in fee. *Id.*
 9. An exemplification of a patent certified by the Commissioner of the General Land Office, may be received in evidence without proof of the loss of the original patent. *Barton v. Murruin*, 235.
 10. Under the general law of the state certified copies of deeds of conveyance may be received in evidence upon proof that the originals are not “within the power” of the party offering such copies—that is, not within his control or possession, nor in the possession of his agent, servant or bailee. *Id.*
 11. Where, however, deeds conveying portions of the military bounty land in this state are executed in other states of the Union, and acknowledged and proved in accordance with the laws and usages of such states and not in accordance with the law of this state, certified copies of such deeds can be read in evidence only upon proof of the loss or destruction of the original. *Id.*
 12. The loss of such instruments should be presumed if it appear that search has been made in the proper places and by the proper persons, and that they can not be found after due diligence has been used in looking for them. *Id.*
 13. The official character of school trustees may be proved by their acts and conduct as such; the oaths of office filed by them with the clerks

EVIDENCE—(Continued.)

- of the county courts and their official bonds are competent evidence to prove such official character. *Eads v. Wooldridge*, 251.
14. In an action for a malicious prosecution, in which it was alleged by the plaintiff that the defendants appeared before the grand jury and, without probable cause, &c., caused plaintiff to be indicted for perjury, no grand juror can be permitted to testify and disclose the name of any witness who appeared before said jury. *Beam v. Link*, 261.
 15. Where a suit is commenced by attachment on a promissory note and a person interpleads claiming the property attached as trustee for the wife of the defendant in the attachment, by virtue of a deed executed and recorded two years before the date of the note sued on, the plaintiff may show that the note sued on was given for a debt that existed before the execution of said deed. *Blue v. Penneston*, 272.
 16. The acts of the grantor (the father of the *cestui que trust* in said deed) and her husband (the defendant in the attachment suit) in selling certain of the slaves embraced in said deed, are competent evidence as bearing upon the question of fraud in its execution. *Id.*
 17. In an action on a warranty of soundness of a negro slave, the declarations of such slave with respect to her symptoms, made by her when sick, are competent evidence as bearing upon the question of unsoundness. *Wadlow v. Perryman's Adm'r*, 279.
 18. Where a document is admissible in evidence for any purpose, it should not be excluded; it devolves on the opposite party to call on the court to state and explain to the jury how far and for what purposes it is evidence. *Allen v. Moss*, 354.
 19. The admissions of a party to a proceeding for divorce are evidence against him, but alone they are not sufficient to warrant a decree; they must be supported by other evidence. *Twyman v. Twyman*, 383.
 20. Interest in the event of a suit does not render the person so interested an incompetent witness. *Sawyer v. Mitchell*, 510.
 21. The fact that a person introduced as a witness had, before the commencement of the suit, received an order from the plaintiff for sum sued for, the order not being accepted in discharge of the debt due him from the plaintiff, and that he was authorized to bring suit for the plaintiff, does not disqualify him as a witness in behalf of the plaintiff; the suit is not prosecuted for his immediate benefit. *Id.*
 22. The relation of maker and endorser of a promissory note so far continues, after the recovery of judgments against them at the suit of an endorsee, that an agreement with the maker to stay execution as to him for a specified period will operate a discharge of the endorser, and entitle him to a perpetual stay of execution. *Smith v. Price*, 505.
 23. If relevant testimony with respect to an alleged written contract be introduced by either party to a suit, the other party is entitled to have said contract read in evidence. *Newman v. Mays*, 520.
 24. Where there is any testimony which tends to support any of the issues in a cause, it is error to instruct the jury that there is no evidence before them. *Yates v. Brackenridge*, 531.
 25. The admissions or declarations of one partner are competent evidence

EVIDENCE—(Continued.)

against the other partners; if made after the dissolution of the partnership they are not competent evidence. *American Iron Mountain Co. v. Evans*, 552.

26. A., a blacksmith, sued B.'s administrator to recover a blacksmithing account of five years' standing, amounting altogether during that time to \$183.25, the balance claimed after allowing credits being \$97.25. *Held*, 1st, that in order to account for the non-production of the plaintiff's books, it might be shown that the books were kept by the plaintiff himself; 2d, that, some of the particular items charged being proved, it was competent for the plaintiff to show, in support of his general account, that B. had all his blacksmithing done at plaintiff's shop; that B.'s farm was of a particular extent, and that he had thereon a particular number of horses and wagons, and testimony of a like character. *Fath v. Meyers' Adm'r*, 568.
27. Where a party's acts are given in evidence, he may give in evidence, in rebuttal, other acts which are a part of, or connected with and explanatory of, those previously used against him. *Blair v. Marks*, 579.
28. Where a homicide is committed under circumstances that leave it in doubt whether the act was committed maliciously or from an apprehension of real danger, the jury may consider the fact that the deceased was of rash, turbulent and violent disposition in determining whether the accused had reasonable cause to apprehend great personal injury to himself. *State v. Hicks*, 588.

EXECUTION.

See JUSTICES' COURTS, 4, 5. SHERIFF'S SALES. HUSBAND & WIFE.

1. An execution issued by a justice of the peace can not regularly be returned before the return day thereof; should it be returned *nulla bona* by the constable, and a transcript of the judgment of the justice be filed in the office of the clerk of the circuit court, and an execution be issued by said clerk upon said certified judgment before the return day of the execution issued by the justice, the circuit court should quash such execution. *Dillon v. Rash*, 243.
2. Every execution must be founded on a legal judgment. *Bain v. Cushman*, 293.
3. Where a constable wrongfully levies an execution upon property exempt by law from execution, relief can be had, upon his official bond, against him and his securities, only by action thereon in the name of the state; the 23d and 28th sections of the eighth article of the act concerning justices' courts do not furnish a summary remedy in such case. (R. C. 1855, p. 968.) *Miller v. Wall*, 440.
4. Where a father, being in failing circumstances, purchases land and causes the title to be vested in a third person in trust for his own children with a view to defraud his creditors, there will be a resulting trust to himself for the benefit of his creditors; this interest may be seized and sold on execution under a judgment against him in favor of one of those creditors. *Herrington v. Herrington*, 560.

EXEMPTION FROM LEVY.

See HUSBAND AND WIFE.

F

FACTOR.

See PRINCIPAL AND AGENT.

FEES.

See SHERIFF'S SALES, 3, 4. COSTS.

FINDING OF FACTS.

See PRACTICE.

FIXTURES.

1. A bathing tub and lead water pipes fastened to the walls and floor of a building by nailing are fixtures as between a vendor and vendee. *Cohen v. Kyler*, 122.
2. It is a mixed question of law and fact whether particular things are fixtures or not; juries should be guided to an intelligent determination of the question by an explanation of the legal meaning of the term. *Grand Lodge v. Knox*, 315.

FORCIBLE ENTRY AND DETAINER.

1. An action of unlawful detainer can not be maintained in the name of one person to the use of another; it can only be maintained by the person or persons entitled to the possession of the premises in controversy. *Ferguson v. Ham*, 249.
2. In an action of forcible entry and detainer, in case of a verdict for the complainant, the jury may assess damages for all waste and injury committed upon the premises as well as for all rents and profits of the same up to the time of the rendition of the verdict. *Eads v. Woolbridge*, 251.
3. The term disseizin, as used in the third section of the act concerning forcible entry and detainer (R. C. 1855, p. 787); has not a technical meaning; it applies to any entry, which is wrongful and without force, upon the actual possession of another. *Spalding v. Mayhall*, 377.
4. In an action of unlawful detainer the merits of the title can in nowise be inquired into; it is immaterial whether the intruder is a naked trespasser or enters under a paramount title; the purchaser at a sheriff's sale under an execution is put to his ejectment if the defendant refuse to yield possession. *Id.*
5. Where a wrongful entry has been made upon premises in the possession of a tenant, he and not his landlord is the proper person to institute and maintain an action of forcible entry and detainer. *Burns v. Patrick*, 434.
6. In an action of forcible entry and detainer the jury returned the following verdict: "We, the jury, find the defendants guilty in manner and form as charged in plaintiffs' complaint; and that they took possession of the premises the 15th of November, 1854; and that they have and recover of and from the defendants damages at the rate of \$2.16½ per month for the unlawful detention of said premises." *Held*, that this verdict, though informal, was sufficient to authorize thereon a judg-

FORCIBLE ENTRY AND DETAINER—(Continued.)

ment for restitution of the premises, and for an amount as damages equal to double the gross amount of the rents and profits at the rate of \$2.16½ per month up to the time of trial. *Gibson v. Lewis*, 532.

FRAUD AND FRAUDULENT CONVEYANCES.

See PRINCIPAL AND AGENT, 3. EQUITY.

1. A. purchased certain leasehold premises with a saw-mill thereon, which were subject at the time of his purchase to a deed of trust made to secure certain promissory notes. A., at the time of his purchase, had notice of the existence of this deed and supposed it to be a valid encumbrance upon the property. In point of fact the notes and deed of trust were procured by fraud. After A.'s purchase the trustee under the deed of trust advertised the premises for sale and proceeded to sell the same, and at the sale the premises were struck off to one K. as the highest bidder. K. acted as the agent of A. and made the purchase for his benefit. Both A. and K. acted in ignorance of the fraud in procuring the notes and deed of trust. The trustee refused to execute a deed to K. and re-advertised the premises for sale under the deed of trust. K., acting for the benefit of A. and with a bond of indemnity from him, procured a temporary injunction enjoining the sale, A. becoming his surety on his injunction bond. This injunction was afterwards dissolved. In the meantime the saw-mill had burned down during the pendency of the injunction proceedings and previous to the dissolution of the injunction. The damages awarded to the defendants on the dissolution of the injunction were the full amount of the notes, with interest, &c.; which were paid by A. to the person who had originally procured by fraud the execution of the notes and deed of trust. Until after the termination of the injunction proceedings A. supposed that the deed of trust was a valid encumbrance. *Held*, that A., not being the party defrauded, was not entitled to recover back the amount so paid by him. *Maguire v. Hall's Adm'r*, 146.
2. Whenever it appears from the face of an assignment of a stock of goods to a trustee for the benefit of certain designated creditors that it is the intent of the parties thereto that the grantor shall be allowed to remain in possession of the property assigned and to dispose of the same in the usual course of business until default, such deed of assignment should be held to be a conveyance in trust to the use of the grantor within the first section of the act concerning fraudulent conveyances, and consequently void as against creditors. *Stanley v. Bunce*, 269.
3. It is not necessary that the deed of assignment should expressly provide that the grantor should remain in possession and continue to dispose of the goods in the usual course of business; it is sufficient to avoid the assignment that such appears, from a consideration of the whole instrument, to be the intent of the parties. *Id.*
4. Where a suit is commenced by attachment on a promissory note and a person interpleads claiming the property attached as trustee for the wife of the defendant in the attachment, by virtue of a deed executed

FRAUD AND FRAUDULENT CONVEYANCES—(Continued.)

- and recorded two years before the date of the note sued on, the plaintiff may show that the note sued on was given for a debt that existed before the execution of said deed. *Blue v. Penneston*, 272.
5. The acts of the grantor (the father of the *cestui que trust* in said deed) and her husband (the defendant in the attachment suit) in selling certain of the slaves embraced in said deed, are competent evidence as bearing upon the question of fraud in its execution. *Id.*
 6. An equitable proceeding to set aside allowances of a probate court in favor of a guardian can only be sustained by proof that the allowances were fraudulently procured by such guardian. *Mitchell v. Williams*, 399.
 7. Fraud in the consideration of a negotiable promissory note is no defence to an action thereon by an endorsee to whom the same was endorsed before maturity without notice. *Jaccard v. Shands*, 440.
 8. Where a vendor knows the existence of a latent defect in an article sold by him, and sells the same for a sound price without disclosing the defect to the vendee, he is guilty of a fraud; such fraud may be set up as a defence to an action founded on a note given for the price of the article sold; it is not necessary that there should be any express warranty or representation as to the quality of the article sold. *Barron v. Alexander*, 530.
 9. Where a father, being in failing circumstances, purchases land and causes the title to be vested in a third person in trust for his own children with a view to defraud his creditors, there will be a resulting trust to himself for the benefit of his creditors; this interest may be seized and sold on execution under a judgment against him in favor of one or those creditors. *Herrington v. Herrington*, 560.

G

GARNISHEE.

See ATTACHMENT.

GENERAL ASSEMBLY.

See CONSTITUTIONAL LAW. TAXING POWER.

GROCERY-KEEPER.

See CRIMES AND PUNISHMENTS.

GROWING CROP.

See WILLS AND TESTAMENTS.

GUARANTY.

1. A statement, in a letter to a party sought to be retained as clerk of a boat then building, that the boat was expected out at a specified time, can not be construed into a guaranty or engagement that she would be out at the time named. (*Johnson v. McCune*, 21 Mo. 211, affirmed.) *Johnson's Adm'r v. McCune*, 171.

GUARDIAN.

1. If a person, assumig to act as a guardian for another without any legal authority so to do, should receive moneys to be appropriated to the

GUARDIAN—(*Continued.*)

latter's benefit, the statute of limitations would commence to run immediately, unless the existence of a disability should prevent it. *Johnson v. Smith's Adm'r*, 591.

GUARDIAN'S BOND.

1. An action on a guardian's bond must be brought in the name of the state. *Mitchell v. Williams*, 399.
2. In an action on a guardian's bond the settlements and allowances of the guardian in the probate court are conclusive upon the ward. *Id.*
3. An equitable proceeding to set aside allowances of a probate court in favor of a guardian can only be sustained by proof that the allowances were fraudulently procured by such guardian. *Id.*

H

HANNIBAL AND ST. JOSEPH RAILROAD COMPANY.

See CONDEMNATION AND APPROPRIATION TO PUBLIC USES.

HIGHWAYS.

See ROADS AND HIGHWAYS.

HUNT'S MINUTES.

See LANDS AND LAND TITLES.

HUSBAND AND WIFE.

1. Debts contracted by a husband after property has come into the possession of his wife by descent, &c., may be enforced against that property. It is not exempted from execution by the act of March 5, 1849. (Sess. Acts, 1849, p. 67.) *Barbee v. Wimer*, 140.
2. On the death of a husband without children, the increase of a female slave, that came to the husband in right of the marriage, remaining undisposed of at his death, passed, under the dower act of 1845 (R. C. 1845, p. 430, § 3), with the mother to the widow. *Herdon v. Herndon's Adm'r*, 421.

I

IMPORTER.

See CONSTITUTIONAL LAW.

INCORPORATION.

See CORPORATION.

INDEMNIFICATION BOND.

1. The only objection that can be entertained by the court—under the seventh section of the local act of March 3, 1853, concerning the duties of sheriff and marshal in the county of St. Louis, (Sess. Acts, 1855, p. 464)—to an indemnification bond demanded by the sheriff under said act is in relation to the sufficiency of the security; it can not be ob-

INDEMNIFICATION BOND—(*Continued.*)

- jected that the penalty of the bond is insufficient. *Cochran v. Goddard*, 500.
- 2. The action of the court under the 8th section is not conclusive on the claimant as to any other valid objection to the bond. *Id.*

INDICTMENT.

See CRIMES AND PUNISHMENTS.

INFANCY.

See CURATOR. PARTITION. PARENT AND CHILD.

- 1. Infants may be made parties plaintiff in statutory proceedings for partition. (*Johnson v. Noble*, 24 Mo. 252, overruled.) *Thornton v. Thornton*, 302.
- 2. Infants can not appear by attorney; they may appear by guardian. *Id.*
- 3. Generally, the domicile of the parent is the domicile of the minor child. *Lacy v. Williams*, 280.
- 4. A statement, in a letter to a party sought to be retained as clerk of a boat then building, that the boat was expected out at a specified time, can not be construed into a guaranty or engagement that she would be out at the time named. (*Johnson v. McCune*, 21 Mo. 211, affirmed.) *Johnson's Adm'r v. McCune*, 171.
- 5. Leases to infants are not absolutely void; they are only voidable. *Griffith v. Schwenderman*, 412.

INJUNCTION.

See EQUITY.

- 1. L., being indebted to D., E. and F., assigned to D. in trust to secure said D., E. and F. certain promissory notes executed by O. & R. One J. recovered a judgment against L. Afterwards said L., D., E., F., O. & R. entered into an arrangement, by which, upon the allowance of certain credits upon said notes, O. conveyed a certain lot of ground to L., and L. at the same time conveyed the same in trust to secure D., E. and F. The sum bid by D. at this sale was less than the amount of the indebtedness, to secure which the deed of trust was given. The land was sold under this deed of trust, and D. became the purchaser. J. caused an execution to be issued upon his judgment against L. and to be levied upon L.'s interest in said lot. Held, that L. had no interest in the lot upon which J.'s judgment might operate as a lien; that consequently no title would pass to a purchaser at a sheriff's sale under said execution; that an injunction would not lie to restrain a sheriff's sale thereunder. *Drake v. Jones*, 428.
- 2. Sheriff's sales can not be enjoined on the ground that they will pass no title and may cast a cloud on the title of the true owner. *Id.*

INSOLVENT LAWS.

- 1. A., a citizen of and residing in the state of Missouri, sold goods to B., who also at the time of the sale resided in said state; B. gave his note to A. for the indebtedness thus incurred; B. afterwards went to and became a citizen of California; A. transmitted said note to one C., an attorney at law in California, for collection; C., deeming it for the

INSOLVENT LAWS—(Continued.)

interest of A., surrendered said note to B., and received in renewal thereof another note from B.; this note was made payable to the order of "C., attorney of A.;" while this note remained in the hands of C., B. obtained a discharge therefrom under the insolvent law of California; C. afterwards endorsed the note to A. in Missouri, who commenced a suit thereon against B. *Held*, that the discharge under the insolvent law of California could not be regarded as a valid discharge by the law of this state. *Crow v. Coons*, 512.

INSTRUCTIONS.

See PRACTICE. JURY.

INSURANCE.

1. Among the printed clauses of a fire policy on merchandise were the following: "If there shall be deposited, kept or stored therein any of the articles, goods or merchandise in the same terms and conditions denominated 'hazardous,' or 'extra hazardous,' or included in the memorandum of 'special' rates, except as herein specially provided for, or hereafter agreed to by this corporation in writing, to be added to or endorsed upon this policy, then and from thenceforth so long as the same shall be so appropriated, applied or used, these presents shall cease and be of no force and effect." "And it is conditioned that no greater amount than twenty-five pounds of gunpowder shall at any time be placed in the building described in this policy—said powder to be kept in tin or other metallic canisters." Among the articles enumerated in the memorandum of "special" rates was gunpowder. There were no other provisions with respect to the keeping of gunpowder. *Held*, that the assured might keep on hand a quantity of powder less than twenty-five pounds in tin or other metallic canisters. *Bowman v. Pacific Insurance Co.* 152.
2. The deposit of a policy of insurance with a creditor of the assured as a security for the debt gives such creditor a lien upon the proceeds of the policy, a lien binding upon the assured, the insurer, and upon all who, with notice of such lien, take an interest in the policy from the assured. *Ellis v. Kreutzinger*, 311.
3. The clause in a policy which prohibits an assignment of the policy without the consent in writing of the insurance company, does not apply to a deposit of the policy by way of pledge. *Id.*

INTEREST.

See WITNESS.

8. Whether an administrator shall be charged with interest on money in his hands belonging to his intestate's estate is to be determined by the circumstances of each case; he is not to be so charged as a matter of course. *Madden's heirs v. Madden's Adm'r*, 544.

J

JUDGMENT.

See RES ADJUDICATA. EQUITY. JUSTICES' COURTS. RELEASE. PARTNERSHIP. PARTITION. ATTACHMENT.

1. Every execution must be founded on a legal judgment. *Bain v. Cushman*, 293.
2. The relation of maker and endorser of a promissory note so far continues, after the recovery of judgments against them at the suit of an endorsee, that an agreement with the maker to stay execution as to him for a specified period will operate a discharge of the endorser, and entitle him to a perpetual stay of execution. *Smith v. Rice*, 505.

JURISDICTION.

See COUNTY COURTS. PRACTICE. ATTACHMENT. JUSTICES' COURTS.

JURY.

See PRACTICE. PRACTICE AND PROCEEDINGS IN CRIMINAL CASES.

1. Verdicts of juries should not be set aside on the ground that the damages allowed are excessive, unless they are so extravagant as to bear evident marks of prejudice, passion or corruption. *Goetz v. Amba*, 28.
2. Where an instruction given at the instance of a party to a suit is decisive thereof and excludes from the consideration of the jury the questions raised by the evidence of the opposing party, it is erroneous. *Clark v. Hammerle*, 55.
3. It is the province of the court to construe written instruments; where, however, they are adduced as containing evidence of facts, the jury are authorized to draw such inferences from them as they may deem warranted. *Primm v. Haren*, 205.

JUSTICES' COURTS.

See ATTACHMENT, 1, 2, 3.

1. A judgment rendered by a justice of the peace is void unless it appears on the face of the proceedings that the justice acquired jurisdiction of the cause by service of process on the defendant or by his appearance. *Bersch v. Schneider*, 101.
2. The technical rules of practice are not applicable to proceedings before justices of the peace. *Morse v. Broomfield*, 224.
3. Where in the trial, before a justice of the peace, of an issue raised by an interplea in an attachment suit, the justice entered on his docket the verdict of the jury but omitted to render judgment on it, and the interpleader appealed to the circuit court, where the appeal was dismissed for want of a judgment by the justice; *held*, that such dismissal was improper. *Id.*
4. An execution issued by a justice of the peace can not regularly be returned before the return day thereof; should it be returned *nulla bona* by the constable, and a transcript of the judgment of the justice be filed in the office of the clerk of the circuit court, and an execution be issued by said clerk upon said certified judgment before the return day

JUSTICES' COURTS—(Continued.)

- of the execution issued by the justice, the circuit court should quash such execution. *Dillon v. Rash*, 243.
5. Where a justice of the peace, in the case of separate suits by different parties against the same person, improperly renders a joint judgment in favor of the two separate plaintiffs, and certifies the same as a single judgment to the circuit court, any execution or other proceeding instituted thereon should be quashed and set aside. *Bain v. Chrisman*, 293.
 6. Under the revised code of 1845, a justice of the peace could set aside a nonsuit only in case it was rendered on account of the absence of the plaintiff at the time appointed for trial; if a justice should render a judgment of nonsuit and dismiss a cause for the alleged reason that the plaintiff had not filed with him the instrument of writing on which the suit was founded, no motion to set aside such nonsuit would be necessary to entitle the plaintiff to an appeal. *Hannibal, Ralls County and Paris Plank Road Co. v. Robinson*, 396.
 7. The seventh section of the second article of the act regulating proceedings in justices' courts (R. C. 1845, p. 638) did not, in a suit to recover the balance alleged to be due on a subscription to the capital stock of a plank road company organized under the act of February 27, 1851, (Sess. Acts, 1851, p. 259,) require the filing of the original articles of association executed by defendant and others for the purpose of organizing the company. *Id.*
 8. In suits in justices' courts, as well as in suits in the superior courts, the defendant, in order to impose upon the plaintiff the necessity of proving the execution of an instrument sued on, must deny its execution under oath. *Hickman v. Kunkle*, 401.
 9. Where a constable wrongfully levies an execution upon property exempt by law from execution, relief can be had, upon his official bond, against him and his securities, only by action thereon in the name of the state; the 23d and 28th sections of the eighth article of the act concerning justices' courts do not furnish a summary remedy in such case. (R. C. 1855, p. 968.) *Miller v. Wall*, 440.
 10. Where a justice of the peace takes a recognizance to keep the peace, he is required to transmit to the clerk of the proper court only the recognizance, and not the affidavit and warrant. *State v. Emnitz*, 521.

L

LANDLORD AND TENANT.

See LEASES.

1. An action for use and occupation can not be maintained unless the relation of landlord and tenant exists between the parties founded on an agreement express or implied. *Cohen v. Kyler*, 122.
2. In the absence of any agreement or understanding between a landlord and his tenant, the rent will be payable yearly and at the end of the year. *Ridgley v. Stillwell*, 128.
3. Where a landlord seeks, under the act concerning landlords and tenants (R. C. 1855, p. 1016-17), to recover possession of the demised prem-

LANDLORD AND TENANT—(Continued.)

- ises, the statement filed by him before the justice of the peace must set forth the amount of rent actually due to such landlord, and that the same has been demanded from the tenant. *Vaughn v. Locke*, 290.
4. Where one purchasing the demised premises of the landlord seeks to recover possession of them under the 38th section of said act, his statement of the amount of rent due and demanded should embrace only that which is due to himself, and not that which is due to his vendor. *Id.*
 5. Where a wrongful entry has been made upon premises in the possession of a tenant, he and not his landlord is the proper person to institute and maintain an action of forcible entry and detainer. *Burns v. Patrick*, 434.

LANDS AND LAND TITLES.

1. In March, 1789, one Joachim Roy made his will; it was executed in the presence of the lieutenant governor of Upper Louisiana, and attested by him and seven other witnesses; it was deposited among the archives of the Spanish government and a copy thereof was given out by the lieutenant governor of said province on the 24th of July, 1801, a few months after the death of said Roy; *held*, that the will was a valid and operative instrument under the Spanish law without further proof. *Clark v. Hammerle*, 55.
2. Hunt's Minutes of Testimony taken under the act of Congress of May 26, 1824, are not admissible in evidence except to prove such facts as can be proved by hearsay; where, however, one party to a suit introduces them in evidence, the opposing party may have the full benefit of them. *Id.*
3. A certificate of confirmation issued in 1825 by Recorder Hunt, under the act of Congress of May 26, 1824, in favor of Joachim Roy's representatives, for a lot in the Cul de Sac, described the lot confirmed as bounded north by a field lot of A. Guion, and east by Auguste Chouteau's mill tract. On the margin of the claim of A. Guion are the following words: "In Chouteau's mill tract." *Held*, that this marginal entry was not admissible in evidence, as against those claiming under Roy, to show that the lot confirmed to Roy was situate within Chouteau's mill tract. The Spanish survey of "Chouteau's mill tract," in which the land on the west of the survey is stated to be "vacante," is admissible in evidence as bearing upon the question of the location of Roy's confirmation; the same weight should be attached to it as to reputation or hearsay in establishing ancient boundaries. *Id.*
4. Where a field lot confirmed by the second section of the act of Congress of April 29, 1816, has a definite and certain location, the statute of limitation will run in favor of an adverse possession prior to a survey by the United States, although in the tabular list of the recorder the claim was stated to be "confirmed to be surveyed." *Aubuchon v. Ames*, 89.
5. *Quere*, can Carondelet be shown to have title to land as common under the statute of limitation? *Primm v. Haren*, 205.
6. The United States survey of Carondelet common includes private claims; hence, it would be erroneous to rule that twenty years' claim

LANDS AND LAND TITLES—(Continued.)

- and user as common, by the inhabitants of Carondelet, of the land embraced in said survey would bar the right of a private claimant who seeks to recover possession of land embraced in said survey as confirmed to him by act of Congress of June 13, 1812. *Id.*
7. The recorder of land titles was not authorized by the act of Congress of May 26, 1824, to take proof in relation to the extent and boundaries of common confirmed to a village by the act of Congress of June 13, 1812; consequently, a certificate of confirmation of common issued by him would not be evidence of title thereto. *Id.*
 8. Declarations of a person in possession of land as a life tenant can not be received in evidence to elevate his life estate into an estate in fee. *Witson v. Bissell*, 220.
 9. By the Spanish law a verbal sale of immovable property was valid; to constitute such a sale valid it was not necessary the vendee should take possession, though taking possession would be strong corroborative evidence of such a sale. *Allen v. Moss*, 354.
 10. The eighth section of the act of October 1st, 1804, (1 Terr. Laws, p. 47,) requiring all deeds and conveyances to be recorded under the penalty of being adjudged fraudulent and void against subsequent purchasers and mortgagees, did not overthrow the rule of the Spanish law making verbal sales of land valid. *Id.*
 11. The commissioners appointed by the act of Congress of July 9, 1832, (4 Statutes at Large, p. 565,) were authorized to examine those unconfirmed claims only that had been previously filed in the office of the recorder of land titles; no new claims could be filed. After the passage of said act, claims undisposed of in the interval after their reservation from sale had ceased stood as they did before the passage of the act of May 26, 1824. *Papin v. Massey*, 445.
 12. A confirmation by the act of Congress of July 4, 1836, (5 Statutes at Large, p. 126,) to a person or his legal representatives, will enure, if he had assigned his interest previously to the confirmation, or was dead at that time, to his legal representatives; that is, to his heirs or to the assignee of whole or part. If only part had been assigned, the assignee and heirs would take as tenants in common. *Id.*
 13. A., the owner of an unconfirmed Spanish grant for 30,000 arpens, entered into a bond with B., in the penal sum of \$20,000, conditioned for the conveyance by himself and his heirs of 14,000 arpens out of said grant of 30,000 arpens, provided said grant should be confirmed to the said A. or his representatives. Said grant was afterwards confirmed to said A. or his representatives. *Held*, that the confirmation enured to the benefit of B., as the legal representative of A., as to that portion (14-30) of the confirmed claim covered by said bond. *Id.*

LEASES.

See LANDLORD AND TENANT.

1. Leases to infants are not absolutely void; they are only voidable. *Griffith v. Schwendeman*, 412.

LICENSE.

See CRIMES AND PUNISHMENTS. CONSTITUTIONAL LAW.

LIEN.

See COMMON CARRIER. PARTITION. INSURANCE. EQUITY. ATTACHMENT. CONSTABLE. MECHANICS' LIEN.

LIMITATION.

See DEDICATION TO THE PUBLIC.

1. Where a field lot confirmed by the second section of the act of Congress of April 29, 1816, has a definite and certain location, the statute of limitation will run in favor of an adverse possession prior to a survey by the United States, although in the tabular list of the recorder the claim was stated to be "confirmed to be surveyed." *Aubuchon v. Ames*, 89.
2. An action for use and occupation can not be maintained unless the relation of landlord and tenant exists between the parties founded on an agreement express or implied. *Cohen v. Kyler*, 122.
3. Where a plaintiff in an action of ejectment bases his right to recover upon a title acquired by an adverse possession for twenty years, it is not necessary that his possession, or that of those under whom he claims, should be connected with the possession of previous occupants by instruments in writing; the continuity of the possession may be shown by any testimony that is legitimate and pertinent. *Menkens v. Blumenthal*, 198.
4. *Quere*, can Carondelet be shown to have title to land as common under the statute of limitation? *Primm v. Haren*, 205.
5. The United States survey of Carondelet common includes private claims; hence, it would be erroneous to rule that twenty years' claim and user as common, by the inhabitants of Carondelet, of the land embraced in said survey would bar the right of a private claimant who seeks to recover possession of land embraced in said survey as confirmed to him by act of Congress of June 13, 1812. *Id.*
6. When user alone, disconnected with any act of the owner showing an intention to dedicate, is relied on as evidence of a dedication of a right of way to the public, it must continue the length of time necessary to bar an action to recover the possession of land; the same length of time of nonuser would, it would seem, be necessary to raise a presumption of abandonment by the public. *The State v. Young*, 259.
7. In order that a defendant may defeat a recovery in an action of ejectment by showing an outstanding title in a third person, such outstanding title so set up must be a present, subsisting and operative title, such an one as the owner thereof could recover on if he were asserting it in an action. *McDonald v. Schneider*, 405.
8. Possession of land is presumed to be in the true owner. Being presumed to be in the possession of the whole, another entering upon him, whether under color of title or not, can acquire title as against him, under the statute of limitations, only to such portion as is actually occupied by him for twenty years adversely to the true owner; he is confined to his actual adverse possession, and the burden is on him to show such actual adverse possession and its extent. *Id.*

LIMITATION—(Continued.)

9. Actual possession of part of a tract of land under claim and color of title to the whole is constructive possession of the whole as against all persons not having title; as against such person in possession of part, the constructive possession of the residue would be in the true owner. *Griffith v. Schwendeman*, 412.
10. Possession of a parcel that has been occupied for twenty years can not be connected with the possession for a shorter period of another tract so as to bring the latter within the operation of the statute of limitations. *Id.*
11. The trusts not reached or affected by the statute of limitations are those technical and continuing trusts that are not at all cognizable at law, but fall within the proper, peculiar and exclusive jurisdiction of courts of equity. *Johnson v. Smith's Adm'r*, 591.
12. If a person, assuming to act as a guardian for another without any legal authority so to do, should receive moneys to be appropriated to the latter's benefit, the statute of limitations would commence to run immediately, unless the existence of a disability should prevent it. *Id.*

LIS PENDENS.

1. Notice by *lis pendens* can exist only after service of process; nor would a purchaser *pendente lite* be affected by such a notice if the suit, during the pendency of which he made his purchase, should be afterwards abandoned. *Herrington v. Herrington*, 560.

LOAN.

See BAILMENT. BORROWER.

M

MANDAMUS.

1. A mandamus, as a general rule, will not issue unless the party asking it has a clear right and no other specific legal remedy; it will not be granted to bring under review the proceedings of an inferior court on the ground of error, and therefore it will be refused in a case in which a writ of error will lie, or where the party can be redressed by appeal. *Williams v. Judge Cooper Common Pleas*, 225.
2. A mandamus will lie from the circuit court to the county court requiring it to grant an appeal from an order removing the guardian of an insane person, although a writ of error may be resorted to. *Hall v. Andrain County Court*, 329.

MARRIAGE.

See BREACH OF PROMISE OF MARRIAGE. HUSBAND AND WIFE.

MARSHAL.

See INDEMNIFICATION BOND.

MEASURE OF DAMAGES.

See DAMAGES.

MECHANIC'S LIEN.

1. Where a builder contracts to build a house, he can have no lien for services rendered in superintending his own workmen. *Blakey v. Blakey*, 39.

MECHANIC'S LIEN—(Continued.)

2. A. contracted to build for B. a house; C. and A. agreed to secure B. against all liens, claims and losses. Liens were filed by sub-contractors against said house upon which writs of *scire facias* were issued against A. and B. These writs were served upon B., the owner, but not upon A. Judgments by default were rendered against B., which he paid. *Held*, in a suit instituted by B. against C. to recover damages for the breach of the agreement above referred to, that the records and proceedings in said suits against B. were admissible in his favor to show the amount of the judgments, and the payment of them by him. The judgments were not, however, conclusive upon C. *Picot v. Signiogo*, 125.
3. Judgments in enforcement of liens against A. and B., upon service of process upon both, would be conclusive upon C. *Id.*
4. The local mechanic's lien act of St. Louis county of February 24, 1843, (Sess. Acts, 1843, p. 83,) did not confer a lien where the person for whom the building is erected has no interest in the premises, but is a mere tenant at will. *Squires v. Fithian's Adm'r*, 134.
5. The thirty days' notice referred to in said act is required only of sub-contractors. *Id.*
6. Where the contract for the building of a house is really incomplete, the work being prosecuted from time to time as materials may be provided or as the progress of other work may require, the mechanic is not required to file his lien within six months of the completion of each detached piece of work, but within six months of the completion of the whole work. *Id.*
7. Although, in a suit instituted to enforce a mechanic's lien, the plaintiff may fail to show the existence of a lien in his favor, he will be entitled, if the pleadings and the evidence will warrant, to a general judgment. *Patrick v. Abeles*, 134.
8. The nature of an action is to be determined by the petition and not by the facts as they appear in evidence. *Id.*
9. It is not necessary that the petition in a suit (under the mechanic's lien act of 1845, R. C. 1845, p. 735, sec. 7) to enforce a mechanic's lien should contain a prayer for a special execution against the property alleged to be charged with the lien; if the account filed with the petition and referred to therein corresponds with that filed as a lien demand, it sufficiently appears that the object of the suit is the enforcement of the lien. *Johnson v. McHenry*, 264.

MERCHANTS' LICENSES.

See CONSTITUTIONAL LAW. TAXING POWER.

MILITARY BOUNTY LAND.

See EVIDENCE, 11, 12.

MISTAKE.

1. One A. B., being indebted to C. D. in the sum of \$538.96, conveyed a certain tract of land to E. F. in trust to secure the payment thereof. In said deed the land, situate in St. Louis county, was described as

MISTAKE—(Continued.)

follows: "A tract of eighty acres of land in the northern end of survey number 369, confirmed to Samuel Smith, in township 45 north, of range 4 east, commencing, &c., [here follows a description by metes and bounds] and being all the land now owned by said A. B. within said survey No. 369." Default being made in the payment of the indebtedness secured, the trustee proceeded, at the request of C. D. and in accordance with the provisions of the trust deed, to advertise and sell the land. In his advertisement he described the land to be sold by copying the description in the deed of trust. On the day of sale the trustee proceeded to sell; the advertisement was first read, and the land was offered for sale as a tract containing eighty acres, more or less. Bids were asked by the acre for the whole tract. One G. H. was the highest bidder at the price of \$8.50 per acre, and the tract was struck off to him at that price, and the trustee gave him a memorandum of said purchase, stating that he, G. H., had become "the purchaser of said land at and for the price of eight dollars and fifty cents per acre, and had paid on his purchase \$500." The trustee paid over the said \$500 to C. D., and it was credited upon the debt. The tract was subsequently surveyed and was found to contain only twenty-three acres. During these transactions none of the parties thereto supposed that the tract contained less than eighty acres. *Held*, in a suit instituted by G. H., the purchaser, against C. D. to recover back the excess of said \$500 over and above the sum that twenty-three acres would have amounted to at \$8.50 per acre, 1st, that the sale by the trustee was not, properly considered, a sale by the acre, but a sale of the tract as a tract; 2d, that the purchaser, having bought the tract as containing eighty acres, could not recover of the *cestui que trust* or creditor the excess sued for; 3d, that he was entitled on the ground of mistake to have the sale set aside. *Coons v. North*, 73.

2. A division line mistakenly located and agreed upon by adjoining proprietors will not be held binding and conclusive upon them if no in justice be done by disregarding it. *Menkens v. Blumenthal*, 198.

"MORE OR LESS."

See AGREEMENT.

MORTGAGE.

1. The transfer of a debt secured by mortgage or deed of trust carries the security with it as an incident; if several promissory notes, secured by the same instrument, be assigned to different persons, the assignee of each note will, as a general rule, acquire an equitable interest in the mortgage. *Anderson v. Baumgartner*, 80.
2. The interest which the assignee thus acquires in the security is purely equitable; it may be lost through his negligence; it will be so lost where the rights of innocent purchasers intervene who have been misled by improper representations on his part, or lulled into security by his silence when it was his duty to speak. *Id.*
3. The test by which to determine whether a transaction is a mortgage or a conditional sale is this: if the relation of debtor and creditor re-

MORTGAGE—(Continued.)

- mains and a debt still subsists between the parties, it is a mortgage; if, however, there is no debt still subsisting, and the grantor has the privilege of refunding if he pleases by a given time and thereby entitling himself to a reconveyance, it is a conditional sale. *Slowey v. McMurray*, 113.
4. If the transaction is a conditional sale, the party seeking a reconveyance to himself must strictly comply with the conditions imposed upon him. *Id.*
 5. The deposit of a policy of insurance with a creditor of the assured as a security for the debt gives such creditor a lien upon the proceeds of the policy, a lien binding upon the assured, the insurer, and upon all who, with notice of such lien, take an interest in the policy from the assured. *Ellis v. Kreutzinger*, 311.
 6. The clause in a policy which prohibits an assignment of the policy without the consent in writing of the insurance company, does not apply to a deposit of the policy by way of pledge. *Id.*
 7. Under the revised code of 1835 (R. C. 1835, p. 410) a mortgagee might, through an attorney in fact, acknowledge satisfaction of a mortgage on the margin of the record thereof; it was not necessary that such acknowledgment should be under seal, or that the agent should be authorized by instrument under seal. *Valle's Adm'rx v. American Iron Mountain Co.* 455.
 8. Such an entry, except in giving notice, occupies no higher ground than an unrecorded release; a direct proceeding to set it aside is not necessary. *Id.*
 9. It was not necessary, under the revised code of 1835 (R. C. 1835, p. 410, § 13), in order to authorize an acknowledgment of satisfaction of a mortgage on the margin of the record thereof, that there should have been actual payment in money of the mortgage debt; it was sufficient that there was "full satisfaction" of the mortgage. *Id.*
 10. In a statutory proceeding to foreclose a mortgage, where the defendant sets up as a bar to the action an acknowledgment of satisfaction of the mortgage on the margin of the record thereof, the plaintiff may show in rebuttal that such acknowledgment was procured by fraud. *Id.*
 11. In proceedings instituted under the revised code of 1845 to foreclose a mortgage, the administrator of the mortgagor was the only necessary party; his heirs were not necessary parties. *Perkins v. Woods*, 547.
 12. A mortgagee is not bound to notice the partition of the mortgaged premises in a suit instituted for that purpose. If, however, in a partition suit, in which he is a party defendant in right of his wife, he should set up his mortgage, and an issue joined with respect to the existence of the mortgage should be determined against him, he would, it seems, be bound by the judgment. If no more appears from the record than that the mortgage was set up by the mortgagee, that issue was taken as to its existence, and that no notice was taken of the mortgage in the interlocutory or final judgments, the record would furnish only *prima facie* evidence that the question of the existence of the mortgage was

MORTGAGE—(Continued.)

passed upon; it might be shown by parol evidence that the question was never actually submitted to or passed upon by the court. *Hull v. Lyon*, 570.

13. Where, during the pending of a suit to foreclose a mortgage, third persons become interested in the premises by purchase, it is not necessary, in order to authorize a decree against them in respect of the interest acquired by them, to make them parties to the suit; they may be made defendants, on their own motion, under the sixth section of the act concerning mortgages. (R. C. 1855, p. 1089.) *Id.*

N

NEGLIGENCE.

See COMMON CARRIER. BAILMENT.

NEW TRIAL.

1. An application for a new trial on the ground of newly discovered evidence should, as a general rule, be accompanied by the affidavit of the party seeking the new trial; the affidavit of a third person should never be received without an explanation of the reason why the party himself omitted to make it. *The State v. McLaughlin*, 111.
2. A new trial will not be granted on the ground of surprise where the object in obtaining the same is the introduction of evidence of a character merely cumulative. *State, to use, &c., v. Wightman*, 121.

NOTICE.

See MORTGAGE, 8. CONVEYANCE. VENDORS AND PURCHASERS. BILLS OF EXCHANGE AND PROMISSORY NOTES. CONDEMNATION AND APPROPRIATION TO PUBLIC USES. ATTACHMENT.

1. Proceedings, instituted under an act of the legislature for the condemnation and appropriation of private property, commenced without notice to the owner thereof, are void. *Dickey v. Tennison*, 373.
2. A surety in a promissory note, who gives notice to the payee to commence suit forthwith against the principal, a non-resident of the state, is not exonerated from liability by a failure of such payee to commence suit within thirty days after such notice. (See R. C. 1855, p. 1454.) *Phillips v. Riley*, 386.
3. The record of a deed not acknowledged or proved according to the law in force at the time such record was made, imparts notice to all persons of the contents of such deed. (See R. C. 1855, p. 731; Sess. Acts, 1847, p. 95.) *Allen v. Moss*, 354.
4. Notice by *lis pendens* can exist only after service of process; nor would a purchaser *pendente lite* be affected by such a notice if the suit, during the pendency of which he made his purchase, should be afterwards abandoned. *Herrington v. Herrington*, 560.

P

PALMYRA BRANCH BANK.

See CORPORATION, 1.

PARENT AND CHILD.

1. A child allowed by its father to leave home and to work and shift for himself may maintain an action in his own name to recover the value of services rendered by him. *Ream v. Watkins*, 516.
2. At law there will be no implication of a promise on the part of a step-daughter to pay her step-father for necessities furnished by the latter during the minority of the former. *Gillett v. Camp*, 541.

PARTIES.

See PLEADING.

PARTITION.

1. Where a tenant in common in lands conveys his share to one of his co-tenants, he can not have the same partitioned and set apart to him for any purpose. *King v. Howard*, 21.
2. In a suit for partition commenced by suing out a writ of summons against the defendants upon a petition filed in the proper clerk's office, the writ of summons should be served upon the minor defendants; it is not necessary, in such cases, to serve such writ upon the guardian of such minor defendants. *Smith v. Davis*, 298.
3. A suit for partition is not triable, except, by consent of parties, at the term at which the defendant is first bound to appear. *Id.*
4. Infants may be made parties plaintiff in statutory proceedings for partition, (Johnson v. Noble, 24 Mo. 252, overruled.) *Thornton v. Thornton*, 302.
5. An interlocutory judgment in an action for partition, ascertaining the rights of the parties and appointing commissioners, &c., can not regularly be rendered, without the consent of the defendant, at the first term at which he is bound to appear. *Id.*
6. Where a sale in partition proceedings is made and the land embraced in the suit is bid off by one of the parties, the purchaser can not, by any agreement with any of the parties to the suit with respect to the land and the payment of the purchase money, affect the right of the sheriff to collect of such purchaser his lawful fees or enough of the purchase money to pay the costs and the portions of the purchase money belonging to those parties, if any, who do not enter into any agreement in the nature of a release with the purchaser. *Wiley v. Roberts*, 388.
7. A mortgagee is not bound to notice the partition of the mortgaged premises in a suit instituted for that purpose. If, however, in a partition suit, in which he is a party defendant in right of his wife, he should set up his mortgage, and an issue joined with respect to the existence of the mortgage should be determined against him, he would, it seems, be bound by the judgment. If no more appears from the record than that the mortgage was set up by the mortgagee, that issue was taken as to its existence, and that no notice was taken of the mortgage in the in-

PARTITION—(Continued.)

terlocutory or final judgments, the record would furnish only *prima facie* evidence that the question of the existence of the mortgage was passed upon; it might be shown by parol evidence that the question was never actually submitted to or passed upon by the court. *Hull v. Lyon*, 570.

8. In an action for partition the plaintiff alleged that himself and defendant were joint owners of a certain tract of land; that they were "equal partners" in the same; that the said tract had been divided into town lots, a part of which had been sold; that the residue of the lots were the joint property of the plaintiff and defendant; and prayed for partition of said remaining lots. The court sustained a demurrer to this petition. *Held*, that the demurrer was improperly sustained; that if the plaintiff and defendant held the land as partners and the affairs of the partnership were unadjusted, the land being chargeable with debts of the firm, or with a balance due the defendant, this matter should be set up in an answer; that, no such defence being interposed, partition might be made of the lots remaining unsold. *Holmes v. McGee*, 597.

PARTNERSHIP.

1. A surviving partner retained possession of the partnership effects and gave bond under sections 50 and 51 of the first article of the administration act of 1845 (R. C. 1845, p. 70); a settlement was made by him in the probate court and an order was made by said court apportioning to the estate of the deceased partner one-half of the balance found to be in the hands of such surviving partner. *Held*, in an action on the bond to recover a debt due to the deceased partner for money advanced by him to the firm, that this settlement was not conclusive as against his estate as to the amount due thereto from the surviving partner, or as to the amount of assets in the hands of the latter. *The State, to use, &c., v. Baldwin*, 103.
2. A promissory note given by one partner in the name of the firm is binding, *prima facie*, upon all the partners; if the note be given for the individual debt of the partner executing the same, or for an indebtedness created in relation to a matter known to be foreign to the business of the partnership, the partnership is not bound. It devolves upon the partners, in order to escape liability, to show these facts. *Hickman v. Kunkle*, 401.
3. A. and B. as partners owed a debt to C.; A. sold out his interest to D., who agreed with A. and B. to assume and pay the debt due C. *Held*, that C. could not maintain an action, in his own name, against D., on his said promise, to recover the said debt. *Manny v. Frasier's Adm'r*, 419.
4. Where there has been no settlement of the accounts of a partnership and no balance ascertained, an action in the nature of an action of assumpsit can not be maintained by one partner against the other to recover such undetermined balance; it is not the province of the jury to take an account and adjust the equities arising out of unsettled partnership transactions. *McKnight v. McCutchen*, 436.

PARTNERSHIP—(Continued.)

5. Acts of a partner wholly outside the scope of the partnership business and known to be so by the person dealing with such partner are not binding upon the other partner. *Cayton v. Hardy*, 536.
6. In determining whether particular acts of a partner are within the scope of the partnership business and binding upon all the partners, if the partnership articles are not decisive of this question, the previous dealings and acts of the partners or of any of them, the length of time these acts have continued, &c., may be considered. *Id.*
7. The admissions or declarations of one partner are competent evidence against the other partners; if made after the dissolution of the partnership they are not competent evidence. *American Iron Mountain Co. v. Evans*, 552.
8. In an action for partition the plaintiff alleged that himself and defendant were joint owners of a certain tract of land; that they were "equal partners" in the same; that the said tract had been divided into town lots, a part of which had been sold; that the residue of the lots were the just property of the plaintiff and defendant; and prayed for partition of said remaining lots. The court sustained a demurrer to this petition. *Held*, that the demurrer was improperly sustained; that if the plaintiff and defendant held the land as partners and the affairs of the partnership were unadjusted, the land being chargeable with debts of the firm, or with a balance due the defendant, this matter should be set up in an answer; that, no such defence being interposed, partition might be made of the lots remaining unsold. *Holmes v. McGee*, 597.

PATENT.

See EVIDENCE, 9.

PLEADING.

See JUSTICES' COURTS. LANDLORD AND TENANT, 3, 4. SHERIFF'S SALE, 3, 4. PARTNERSHIP, 5. FORCIBLE ENTRY AND DETAINER.

1. It is generally sufficient in pleading to state facts according to their legal effect; an averment, in a petition in trespass, that the defendant beat and struck plaintiff, will be sustained by evidence showing that he was present aiding and encouraging others in so beating and striking him. *Goetz v. Ambs*, 28.
2. Where in an action of trespass the defendant seeks to show that the plaintiff has no interest in the suit, that he has assigned the cause of action or any interest in the judgment that he expected to obtain, he must set up this matter in his answer. *Id.*
3. The objection that a petition does not state facts sufficient to constitute a cause of action is not waived by a failure to take same by demurrer or answer. *Andrews v. Lynch*, 167.
4. A petition alleging that the plaintiff delivered a slave belonging to him to the defendant for safe keeping, he agreeing to pay defendant a certain sum per day; that said slave had never been delivered by defendant to plaintiff, although plaintiff had demanded said slave from him, is defective; it alleges no contract to re-deliver, no conversion of the slave by defendant, no loss through the negligence of defendant. *Id.*

PLEADING—(Continued.)

5. The nature of an action is to be determined by the petition and not by the facts as they appear in evidence. *Patrick v. Abeles*, 184.
6. It is not necessary that the petition in a suit (under the mechanic's lien act of 1845, R. C. 1845, p. 732, § 7) to enforce a mechanic's lien should contain a prayer for a special execution against the property alleged to be charged with the lien; if the account filed with the petition and referred to therein corresponds with that filed as a lien demand, it sufficiently appears that the object of the suit is the enforcement of the lien. *Johnson v. McHenry*, 264.
7. Under the practice act of 1849, an equitable defence might be made to an action of ejectment. *Hayden v. Stewart*, 286.
8. An action on a guardian's bond must be brought in the name of the state. *Mitchell v. Williams*, 399.
9. Allegations of value in a petition are not admitted by a failure on the part of the defendant to deny them in an answer, or by a default; they are not material traversable allegations. *Field v. Barr*, 416.
10. Where a wrongful entry has been made upon premises in the possession of a tenant, he and not his landlord is the proper person to institute and maintain an action of forcible entry and detainer. *Burns v. Patrick*, 434.
11. In a statutory proceeding to foreclose a mortgage, where the defendant sets up as a bar to the action an acknowledgment of satisfaction of the mortgage on the margin of the record thereof, the plaintiff may show in rebuttal that such acknowledgment was procured by fraud. *Valle's Adm'rx v. American Iron Mountain Co.* 455.
12. Where, in cases arising under the practice act of 1849, facts are set up in an answer by way of equitable defence to the action and not by way of set-off, the plaintiff is not required to reply. *Blodgett v. Greene*, 525.
13. Unless it is expressed in a promissory note that it is "for value received, negotiable and payable without defalcation," the maker thereof will be allowed against an assignee of the same every just set-off or other defence that existed at the time of or before notice of the assignment as against the assignor thereof. *Thomson v. Roatcap*, 283.
14. In proceedings instituted under the revised code of 1845 to foreclose a mortgage, the administrator of the mortgagor was the only necessary party; his heirs were not necessary parties. *Perkins v. Woods*, 547.
15. A petition, in an action for breach of promise of marriage, alleging that about a certain specified date, "the defendant—in consideration that the plaintiff, then being sole and unmarried, at the request of the defendant, faithfully promised to marry the defendant—did then and there undertake and faithfully promise to marry the plaintiff; that, confiding in the said promise and undertaking of said defendant, plaintiff has remained and continued and still is sole and unmarried, and has always been and still is ready and willing to marry the defendant; that though a reasonable time has elapsed since said promise and undertaking for the defendant to marry plaintiff, and although requested so to do, he has wholly neglected and refused, and still does neglect and refuse," &c., is good after verdict on motion in arrest of judgment. *Davis v. Slagle*, 600.

PLEDGE.

See MORTGAGE. INSURANCE.

POLICY OF INSURANCE.

See INSURANCE.

POSSESSION.

See LIMITATION.

PRACTICE.

See JUSTICES' COURTS. MANDAMUS. LANDLORD AND TENANT, 3, 4.
CONDEMNATION AND APPROPRIATION TO PUBLIC USES. COUNTY
COURTS. APPEAL. ATTACHMENT.

1. Instructions should not be given unless supported by the evidence. *Harrison v. Cachelin*, 26.
2. Verdicts of juries should not be set aside on the ground that the damages allowed are excessive, unless they are so extravagant as to bear evident marks of prejudice, passion or corruption. *Goetz v. Ambs*, 28.
3. The fact that a defendant is present in court, during the trial of the cause in obedience to a subpoena, ready to testify when called, will not render it improper to receive in evidence a deposition of said defendant taken in another cause in which he was a party; though not admissible as a deposition, it may, being signed by him, be received as a written admission. *Charleson v. Hunt*, 34.
4. Where a party to a suit, through no negligence on his part, but through reliance upon the promises of a notary before whom a deposition is being taken, and of the opposing counsel, is prevented from cross-examining the witness, the deposition should be suppressed. *Dannefelser v. Weigel*, 45.
5. Where an instruction given at the instance of a party to a suit is decisive thereof and excludes from the consideration of the jury the questions raised by the evidence of the opposing party, it is erroneous. *Clark v. Hammerle*, 55.
6. A judgment rendered by a justice of the peace is void unless it appears on the face of the proceedings that the justice acquired jurisdiction of the cause by service of process on the defendant or by his appearance. *Bersch v. Schneider*, 101.
7. A new trial will not be granted on the ground of surprise where the object in obtaining the same is the introduction of evidence of a character merely cumulative. *State, to use, &c., v. Wightman*, 121.
8. Where a principal seeks to recover specific sums of money alleged to have been received by his agent in the course of his employment, and misappropriated by him, it is not error to refuse to order an account, prayed for by the plaintiff, to be taken. *Matthews v. Wilson*, 155.
9. The revised code of 1855 does not require a finding of the facts where a cause is tried by the court. *Kurlbaum v. Roepke*, 161.
10. Where a cause is tried by the court without a jury and no instructions or declarations of law are asked or given, the supreme court will not interfere by ordering a new trial. *Id.*
11. It is the settled practice of the supreme court not to interfere with the

PRACTICE—(Continued.)

- verdicts of juries because they are against the weight of evidence. *Smock v. White*, 163.
12. The objection that a petition does not state facts sufficient to constitute a cause of action is not waived by a failure to take the same by demurrer or answer. *Andrews v. Lynch*, 167.
 13. A petition alleging that the plaintiff delivered a slave belonging to him to the defendant for safe-keeping, he agreeing to pay defendant a certain sum per day; that said slave had never been delivered by defendant to plaintiff, although plaintiff had demanded said slave from him, is defective; it alleges no contract to re-deliver, no conversion of the slave by defendant, no loss through the negligence of defendant. *Id.*
 14. Although, in a suit instituted to enforce a mechanic's lien, the plaintiff may fail to show the existence of a lien in his favor, he will be entitled, if the pleadings and the evidence will warrant, to a general judgment. *Patrick v. Abeles*, 184.
 15. The nature of an action is to be determined by the petition and not by the facts as they appear in evidence. *Id.*
 16. In cases commenced since the revised code of 1855 went into effect, (May 1, 1856,) the courts are not authorized to make findings of facts; if made, they do not form part of the record, and will not be regarded by the supreme court for any purpose. *Brosius v. McGaugh*, 230.
 17. A finding of the facts made by a court in a suit instituted since the revised code of 1855 went into effect, being unauthorized by law, forms no part of the record of the cause and can not be referred to in the supreme court for any purpose. *Martin v. Martin's Adm'r*, 227.
 18. Amendments should be liberally allowed in furtherance of justice. *Id.*
 19. Case affirmed because no exceptions were saved. *Bancroft v. Benning*, 235.
 20. An execution issued by a justice of the peace can not regularly be returned before the return day thereof; should it be returned *nulla bona* by the constable, and a transcript of the judgment of the justice be filed in the office of the clerk of the circuit court, and an execution be issued by said clerk upon said certified judgment before the return day of the execution issued by the justice, the circuit court should quash such execution. *Dillon v. Rash*, 243.
 21. Where a judgment is irregularly rendered against the provisions of a statute or the rules of court, the party against whom it is rendered is entitled to have it set aside without showing a meritorious defence to the action. *Doan v. Holly*, 256.
 22. Where a judgment is reversed in the supreme court and the cause remanded to the circuit court, and the mandate of the supreme court is received by the clerk of the circuit court after the commencement of a term of said court, and said clerk, of his own motion, docket the cause on the third day of the term, and the court renders judgment by default on the fourth day of the term; *held*—no rule of the court appearing to have been violated—that the defendant was not entitled as of right to have this judgment set aside without showing a meritorious defence. *Id.*

PRACTICE—(Continued.)

23. Judgment affirmed because no exceptions were taken to the admission or exclusion of evidence, and no instructions asked, given or refused. *Baker v. Mockbee*, 263.
24. Where cases commenced since the revised code of 1855 went into effect are tried by the court without a jury, questions of law should be raised by instructions, or declarations of law. *Altum v. Arnold*, 264.
25. Where a notice is given that a motion will be presented to a court on the first Monday of May for the confirmation of an award, and the legislature afterwards changes the time of holding said court from the first to the second Monday, the notice will be sufficient; the party to whom the notice is given must take notice of the change. *Price v. White*, 275.
26. The general appellate jurisdiction that the circuit courts exercise over the county courts does not authorize them to try *de novo* causes appealed from the county courts. *Lacy v. Williams*, 280.
27. Where, in an action of ejectment, the person from or through whom the defendant claims title to the premises has, on motion of the defendant, been made a co-defendant, the plaintiff is not entitled to dismiss the suit as to such co-defendant. *Hayden v. Stewart*, 286.
28. Under the practice act of 1849, an equitable defence might be made to an action of ejectment. *Id.*
29. Where a justice of the peace, in the case of separate suits by different parties against the same person, improperly renders a joint judgment in favor of the two separate plaintiffs, and certifies the same as a single judgment to the circuit court, any execution or other proceeding instituted thereon should be quashed and set aside. *Bain v. Chrisman*, 293.
30. In a suit for partition commenced by suing out a writ of summons against the defendants upon a petition filed in the proper clerk's office, the writ of summons should be served upon the minor defendants; it is not necessary, in such cases, to serve such writ upon the guardian of such minor defendants. *Smith v. Davis*, 298.
31. A suit for partition is not triable, except by consent of parties, at the term at which the defendant is first bound to appear. *Id.*
32. An interlocutory judgment in an action for partition, ascertaining the rights of the parties and appointing commissioners, &c., can not regularly be rendered, without the consent of the defendant, at the first term at which he is bound to appear. *Thornton v. Thornton*, 302.
33. *Quere*, when may writs of *certiorari* issue from the supreme court, and what is the proper office and function of such writs? *Hannibal & St. St. Joseph Railroad Co. v. Morton*, 317.
34. Where a document is admissible in evidence for any purpose, it should not be excluded; it devolves on the opposite party to call on the court to state and explain to the jury how far and for what purposes it is evidence. *Allen v. Moss*, 354.
35. Proceedings, instituted under an act of the legislature for the condemnation and appropriation of private property, commenced without notice to the owner thereof, are void. *Dickey v. Tennison*, 373.
36. After a jury has returned a special verdict, the court should not resub-

PRACTICE—(Continued.)

- mit the cause to them for a general verdict with instructions. *Spalding v. Mayhall*, 377.
37. In suits in justices' courts, as well as in suits in the superior courts, the defendant, in order to impose upon the plaintiff the necessity of proving the execution of an instrument sued on, must deny its execution under oath. *Hickman v. Kunkle*, 401.
 38. The supreme court will not review instructions unless they are excepted to at the time they are given or refused. *Bradley v. Creath*, 415.
 39. In cases tried by a court without a jury under the practice act of 1849, the court should find the facts. *Chick v. Parker*, 418.
 40. A suit on a promissory note by an assignee against the maker is triable at the first term, although the assignment is denied. *Armstrong v. Johnson*, 420.
 41. An appeal to the supreme court must be made, under the revised code of 1855, during the term at which the judgment or decision appealed from is given; it can not be made before the clerk in vacation. (R. C. 1855, p. 1287, sec. 11.) *Stavely v. Kunkel*, 422.
 42. Where it appears from the face of the record of a cause appealed to the supreme court that the plaintiff has no cause of action, the supreme court will reverse a judgment rendered in his favor, although the point upon which the reversal takes place was not brought to the attention of the lower court. *Burns v. Patrick*, 434.
 43. Whether a default shall be set aside is a matter within the discretion of the courts to which application is made for that purpose. *Ridgley v. Steamboat Reindeer*, 442.
 44. Suits instituted in the St. Louis court of common pleas are triable at the return term "in all cases in which the parties continued to be proceeded against at such term shall have been personally summoned for at least fifteen days before the first day of such term;" (R. C. 1855, p. 1595;) inquiry of damages may be made at the return term in a case of judgment of default against a steamboat. *Id.*
 45. A party to a suit has no right to the reversal of a judgment therein for errors that do not in any way affect him, but other of the parties alone. *Papin v. Massey*, 445.
 46. The only objection that can be entertained by the court—under the seventh section of the local act of March 3, 1853, concerning the duties of sheriff and marshal in the county of St. Louis, (Sess. Acts, 1855, p. 464)—to an indemnification bond demanded by the sheriff under said act is in relation to the sufficiency of the security; it can not be objected that the penalty of the bond is insufficient. *Cochran v. Goddard*, 500.
 47. The action of the court under the 8th section is not conclusive on the claimant as to any other valid objection to the bond. *Id.*
 48. After the plaintiff in an action against the endorsers of a promissory note has closed his testimony and an instruction has been moved upon it, it is not error to permit him to recall a witness to show the character of the notice given to the endorsers. *Johnson v. Mason*, 54.
 49. A judgment will not be reversed on account of the admission of irrele-

PRACTICE—(Continued.)

- vant testimony, unless it is calculated to injure the party complaining of its admission. *Newman v. Mays*, 520.
50. Where a justice of the peace takes a recognizance to keep the peace, he is required to transmit to the clerk of the proper court only the recognizance, and not the affidavit and warrant. *State v. Emnitz*, 521.
 51. Where there is any testimony which tends to support any of the issues in a cause, it is error to instruct the jury that there is no evidence before them. *Yates v. Brackenridge*, 531.
 52. By the rules of chancery practice in force prior to the passage of the practice act of 1848, bills of exceptions were as necessary as in common law suits. *Madden's Heirs v. Madden's Adm'r*, 544.

PRACTICE AND PROCEEDINGS IN CRIMINAL CASES.

1. An application for a new trial on the ground of newly discovered evidence should, as a general rule, be accompanied by the affidavit of the party seeking the new trial; the affidavit of a third person should never be received without an explanation of the reason why the party himself omitted to make it. *The State v. McLaughlin*, 111.
2. In all cases in which a person arraigned upon an indictment does not confess the indictment to be true, a plea of not guilty should be entered, and the same proceedings should be had as if he had formally pleaded not guilty to the indictment. (R. C. 1855, p. 1181, § 5.) *State v. Andrews*, 267.
3. In the case of a conviction for an offence not capital, an omission to enter of record the *allocution*, or formal address of the judge to the prisoner, asking him if he has any thing to say why sentence should not be pronounced against him, is not of itself fatal. *The State v. Ball*, 324.
4. In the entry of the empannelling of a jury, the jury were stated to be "twelve good and lawful men," and their names were given, but the same name was inserted twice, making thirteen in all; *held*, that this was merely a clerical error. *Id.*
5. An affirmative verdict, in response to an indictment for murder in the first degree, of "guilty of murder in the second degree, in manner and form as charged," &c., is by implication an acquittal of murder in the first degree, and, so long as it stands, it is a bar to any prosecution for the higher grade of offence. *Id.*
6. In a capital case, the defendant must be present at the time of the rendition of the verdict; and the record must affirmatively show his presence. *The State v. Cross*, 332.
7. The fifth section of the seventh article of the act concerning practice in criminal cases (R. C. 1855, p. 1196) is not applicable to prosecutions for assault and battery commenced before justices of the peace; the jury, in the case of a conviction, must assess the fine to be paid. (See R. C. 1855, p. 979, § 11.) *The State v. Warne*, 418.
8. In retaxing the costs in a cause, if the fees are not legally chargeable they will be disallowed; if the fee-bill on its face is illegal, it must be rejected; but if the charges are such as may have been legally incur-

PRACTICE AND PROCEEDINGS IN CRIMINAL CASES—(Continued.)

red in the prosecution or defence of the action, the fee-bill will be taken to be *prima facie* correct, and the burden of showing its incorrectness is on him who objects to it. *The State v. McO'Blenis*, 508.

PRESUMPTIONS.

See EVIDENCE. CONVEYANCE. LIMITATION.

PRINCIPAL AND AGENT.

1. Where an agent enters into a contract in his own name and does not disclose his principal he is personally liable. *McLellan & Hillyer v. Parker*, 162.
2. One who ratifies an act done in his name without previous authority ratifies it as done; he can not make such an agent responsible for not doing the ratified act in the manner he would have been bound to perform it if he had been an authorized agent. *Menkens v. Watson*, 163.
3. A factor may pay over to his principal the proceeds of goods consigned to him for sale, although he may know that his principal had promised to pay certain of his creditors out of such proceeds. *Pearce v. Roberts*, 179.

PRIVILEGE OF RESHIPPING.

See COMMON CARRIER, 3, 4.

PRIVILEGED COMMUNICATIONS.

1. Communications made to an attorney at law as such are privileged, and the attorney can not be permitted to testify concerning them without the consent of the client. This rule applies to the case where two persons, having hostile interests, consult the same attorney, at the same time, with respect to the matter in dispute, and one of such parties calls upon the attorney to testify with respect to the declarations and admissions made by the other at the consultation. *Hull v. Lyon*, 570.
2. Whether a communication is a privileged one is a question for the court. *Id.*

PROMISSORY NOTES.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

PUBLIC WORSHIP.

See CRIMES AND PUNISHMENTS.

R

RAILROADS.

See COMMON CARRIER.

RATIFICATION.

See PRINCIPAL AND AGENT.

RECOGNIZANCE.

1. Where a justice of the peace takes a recognizance to keep the peace, he is required to transmit to the clerk of the proper court only the recognizance, and not the affidavit and warrant. *The State v. Emnitz*, 521.

RELEASE.

1. A covenant not to sue one of several persons jointly liable will not discharge the others. *Carondelet v. Desnoyer's Adm'r*, 36.
2. At common law a release of one of several joint obligors would discharge all; to have this effect, however, it must be a technical release under seal. *McAllister v. Dennin*, 40.
3. A judgment was recovered against A. and B. on an official bond in which B. was principal and A. his security. B. died leaving him surviving a widow and daughter, his only heir. A. was compelled to pay a portion of the judgment. C., to whom the judgment had been assigned and who had control over it, in consideration of the compromise and dismissal of various suits instituted against him by the heir of B., covenanted by instrument under seal with the said widow and heir never to use or enforce said judgment so far as the same could be made to affect the heirs, executors, or administrators of B., or any property owned by them as such heirs, &c., except as to two specified tracts of land, with respect to which he reserved the right of using said judgment as he might see fit. He also reserved the right of using said judgment against A. and his property. Notwithstanding the execution of this instrument, C. procured the allowance by the probate court of said judgment as a claim against B.'s estate, and it was classed in the fourth class of allowed claims. A. procured the allowance in his favor of a claim against B.'s estate for the amount paid by him in part satisfaction of said judgment; this claim was assigned to the fifth class. *Held*, in a suit instituted by A. against B.'s administrator and C. for the purpose of having the allowance of said judgment in C.'s favor set aside and the assets in the hands of the administrator applied to the payment of A.'s claim, that the instrument executed by C. operated a release of the judgment as against B.'s estate; that (the claims of A. and C. being the only allowed claims) C. was not entitled to have said judgment allowed as a claim against B.'s estate so as to protect the assets thereof (except the excepted property) from the payment of the claim of A.; that said instrument operated a like release of the judgment as to A., he being only a security. *Hempstead v. Hempstead's Adm'r*, 187.
4. A release of one of several sureties by the creditors will discharge the others only so far as the released surety would be bound to make contribution if the other sureties or any of them should pay the entire debt. *Dodd v Winn*, 501.
5. The relation of maker and endorser of a promissory note so far continues, after the recovery of judgments against them at the suit of an endorsee, that an agreement with the maker to stay execution as to him for a specified period will operate a discharge of the endorser, and entitle him to a perpetual stay of execution. *Smith v. Rice*, 505.

RENT.

See LANDLORD AND TENANT.

RES ADJUDICATA.

See PARTNERSHIP, 1. ADMINISTRATION, 4.

1. A. contracted to build for B. a house; C. and A. agreed to secure B. against all liens, claims and losses. Liens were filed by sub-contract-



RES ADJUDICATA—(Continued.)

tors against said house upon which writs of *scire facias* were issued against A. and B. These writs were served upon B., the owner, but not upon A. Judgments by default were rendered against B., which he paid. *Held*, in a suit instituted by B. against C. to recover damages for the breach of the agreement above referred to, that the records and proceedings in said suits against B. were admissible in his favor to show the amount of the judgments, and the payment of them by him. The judgments were not, however, conclusive upon C. *Picot v. Signiogo*, 125.

2. Judgments in enforcement of liens against A. and B., upon service or process upon both, would be conclusive upon C. *Id.*
3. A judgment recovered is conclusive as between the parties thereto as to all matters directly in issue. *Ridgley v. Stillwell*, 128.
4. This rule does not extend to matters collaterally or incidentally considered. *Id.*
5. A judgment rendered by a probate court against an administrator, requiring him to pay over to the distributees a certain sum of money as assets of the intestate's estate, is, in the absence of fraud or collusion, conclusive upon the securities of the administrator in a suit on his official bond. *The State, to use, &c., v. Holt*, 340.
6. In an action on a guardian's bond the settlements and allowances of the guardian in the probate court are conclusive upon the ward. *Mitchell v. Williams*, 399.
7. A mortgagee is not bound to notice the partition of the mortgaged premises in a suit instituted for that purpose. If, however, in a partition suit, in which he is a party defendant in right of his wife, he should set up his mortgage, and an issue joined with respect to the existence of the mortgage should be determined against him, he would, it seems, be bound by the judgment. If no more appears from the record than that the mortgage was set up by the mortgagee, that issue was taken as to its existence, and that no notice was taken of the mortgage in the interlocutory or final judgments, the record would furnish only *prima facie* evidence that the question of the existence of the mortgage was passed upon; it might be shown by parol evidence that the question was never actually submitted to or passed upon by the court. *Hull v. Lyon*, 570.

RESULTING TRUST.

See FRAUD AND FRAUDULENT CONVEYANCES, 9.

RETAXING COSTS.

See COSTS.

RETROSPECTIVE LAWS.

See BOATS AND VESSELS, 6.

RETURN DAY.

See EXECUTION.

ROADS AND HIGHWAYS.

See DEDICATION TO THE PUBLIC.

1. No owner of land over which a road passes can change its location in

ROADS AND HIGHWAYS—(Continued.)

any other manner than that prescribed by law. *The State v. Young*, 259.

2. When user alone, disconnected with any act of the owner showing an intention to dedicate, is relied on as evidence of a dedication of a right of way to the public, it must continue the length of time necessary to bar an action to recover the possession of land; the same length of time of nonuser would, it would seem, be necessary to raise a presumption of abandonment by the public. *Id.*

S

ST. CHARLES.

1. Under the act of December 22, 1824, (R. C. 1825, p. 211,) the trustees of the town of St. Charles had power to lease the common of the town. *McDonald v. Schneider*, 405.
2. It is not sufficient to invalidate such a lease that it was executed in the name of the trustees of the town and not in the name of "The inhabitants of the town of St. Charles"—the corporate name of the town. *Id.*

SALE.

See STATUTE OF FRAUDS. CONDITIONAL SALE. VENDOR AND PURCHASER. SHERIFF'S SALE.

1. Where the delivery of a chattel is conditional, the property will not vest until the condition is performed, or the performance thereof is waived. *Dannefelser v. Weigel*, 45.
2. Where a vendor knows the existence of a latent defect in an article sold by him, and sells the same for a sound price without disclosing the defect to the vendee, he is guilty of a fraud; such fraud may be set up as a defence to an action founded on a note given for the price of the article sold; it is not necessary that there should be any express warranty or representation as to the quality of the article sold. *Barron v. Alexander*, 530.

SATISFACTION OF MORTGAGE.

See MORTGAGE, 7, 8, 9.

SCHOOL TRUSTEES.

See EVIDENCE, 13.

SECURITY.

See SURETY.

SET-OFF.

1. Unless it is expressed in a promissory note that it is "for value received, negotiable and payable without defalcation," the maker thereof will be allowed against an assignee of the same every just set-off or other defence that existed at the time of or before notice of the assignment as against the assignor thereof. *Thomson v. Roatcap*, 283.

SET-OFF—(Continued.)

2. Where, in cases arising under the practice act of 1849, facts are set up in an answer by way of equitable defence to the action and not by way of set-off, the plaintiff is not required to reply. *Blodgett v. Greene*, 525.

SHERIFF.

See INDEMNIFICATION BOND. SHERIFF'S SALES.

SHERIFF'S SALES.

See INDEMNIFICATION BOND.

1. Under the act of July 3, 1807, (1 Terr. Laws, p. 120, § 45,) a sheriff's deed unacknowledged in court was ineffectual to pass the title to the purchaser; the authority of the sheriff being statutory, it should have been strictly pursued. *Allen v. Moss*, 354.
2. A sheriff's deed must be under seal; if not sealed, a court of equity can not aid its imperfect execution; nor should a court presume such a deed to be sealed against the express admission, in an answer, of the party invoking such a presumption, that the sheriff omitted by mistake to seal the deed. *Moreau v. Branham*, 351.
3. A sheriff's sale of real estate is within the statute of frauds, and a note or memorandum thereof in writing must be made to bind the parties. *Wiley v. Roberts*, 388.
4. A memorandum made by a deputy sheriff and signed by him of a sale of one of several lots in a partition proceeding, in which Louis Robert and others were plaintiffs, and one B. T. Adams defendant, was as follows: "Partition, Lands—Louis Robert v. B. T. Adams—Lot No. 11—274 80-100 a.—Louis Robert—\$10.50 per a.—\$2,885.40." Held, that this memorandum was sufficient to take the case out of the statute of frauds. *Id.*
5. The sheriff can, in such case, maintain an action in his own name against the purchaser for the purchase money, although the latter may not have given a note therefor to the sheriff. *Id.*
6. Where a sale in partition proceedings is made and the land embraced in the suit is bid off by one of the parties, the purchaser can not, by any agreement with any of the parties to the suit with respect to the land and the payment of the purchase money, affect the right of the sheriff to collect of such purchaser his lawful fees or enough of the purchase money to pay the costs and the portions of the purchase money belonging to those parties, if any, who do not enter into any agreement in the nature of a release with the purchaser. *Id.*
7. L., being indebted to D., E. and F., assigned to D. in trust to secure said D., E. and F. certain promissory notes executed by O. & R. One J. recovered a judgment against L. Afterwards said L., D., E., F., O. & R. entered into an arrangement, by which, upon the allowance of certain credits upon said notes, O. conveyed a certain lot of ground to L., and L. at the same time conveyed the same in trust to secure D., E. and F. The sum bid by D. at this sale was less than the amount of the indebtedness, to secure which the deed of trust was given. The land was sold under this deed of trust, and D. became the purchaser. J. caused an execution to be issued upon his judgment against L.

SHERIFF'S SALES—(*Continued.*)

and to be levied upon L.'s interest in said lot. *Held*, that L. had no interest in the lot upon which J.'s judgment might operate as a lien; that consequently no title would pass to a purchaser at a sheriff's sale under said execution; that an injunction would not lie to restrain a sheriff's sale thereunder. *Drake v. Jones*, 428.

8. Sheriff's sales can not be enjoined on the ground that they will pass no title and may cast a cloud on the title of the true owner. *Id.*

SLAVE.

See WARRANTY.

SPANISH LAW.

1. In March, 1789, one Joachim Roy made his will; it was executed in the presence of the lieutenant governor of Upper Louisiana, and attested by him and seven other witnesses; it was deposited among the archives of the Spanish government and a copy thereof was given out by the lieutenant governor of said province on the 24th of July, 1801, a few months after the death of said Roy; *held*, that the will was a valid and operative instrument under the Spanish law without further proof. *Clark v. Hammerle*, 55.
2. By the Spanish law a verbal sale of immovable property was valid; to constitute such a sale valid it was not necessary the vendee should take possession, though taking possession would be strong corroborative evidence of such a sale. *Allen v. Moss*, 354.
3. The eighth section of the act of October 1st, 1804, (1 Terr. Laws, p. 47,) requiring all deeds and conveyances to be recorded under the penalty of being adjudged fraudulent and void against subsequent purchasers and mortgagees, did not overthrow the rule of the Spanish law making verbal sales of land valid. *Id.*

STATUTE OF FRAUDS.

See VENDORS AND PURCHASERS, 5.

1. A. purchased certain real estate in his own name and with his own money; at the date of the purchase he agreed with B. that if B. would before a certain specified time pay one-half of the purchase money he should be entitled to one-half of the land; *held*, that A., not paying any portion of the purchase money, had no interest, legal or equitable, in the land; that the contract of B. with A. was within the statute of frauds. *Clawwater v. Tetherow*, 241.
2. A sheriff's sale of real estate is within the statute of frauds, and a note or memorandum thereof in writing must be made to bind the parties. *Wiley v. Roberts*, 388.
3. A memorandum made by a deputy sheriff and signed by him of a sale of one of several lots in a partition proceeding, in which Louis Robert and others were plaintiffs and one B. T. Adams defendant, was as follows: "Partition, Lands—Louis Robert v. B. T. Adams—Lot No. 11—274 80-100 a.—Louis Robert—\$10.50 per a.—\$2,885.40." *Held*, that this memorandum was sufficient to take the case out of the statute of frauds. *Id.* •

STATUTE OF FRAUDS—(Continued.)

4. The sheriff can, in such case, maintain an action in his own name against the purchaser for the purchase money, although the latter may not have given a note therefor to the sheriff. *Id.*

STEP-CHILD.

See PARENT AND CHILD.

STOCKHOLDER.

See CORPORATION 1.

STRAYS.

1. Where cattle are taken up and posted as strays, and the owner, within a year from the date of such taking up, forcibly takes possession of them, he must pay the legal charges of the one who took them up as strays. *Rice v. Underwood*, 551.

SUNDAY.

See CRIMES AND PUNISHMENTS.

SUPREME COURT.

See PRACTICE.

SURETY.

1. A surety in a promissory note, who gives notice to the payee to commence suit forthwith against the principal, a non-resident of the state, is not exonerated from liability by a failure of such payee to commence suit within thirty days after such notice. (See R. C. 1855, p. 1454.) *Phillips v. Riley*, 386.
2. A release of one of several sureties by the creditors will discharge the others only so far as the released surety would be bound to make contribution if the other sureties or any of them should pay the entire debt. *Dodd v. Winn*, 501.
3. A., the payee of a promissory note obtained judgment thereon against B., one of five sureties; an execution under said judgment was levied on property belonging to B. sufficient to make the debt; A. ordered this execution to be returned unsatisfied; A. subsequently commenced suit against C., another of said sureties; *held*, that if all the sureties were solvent A. could recover of C. only four-fifths of the debt; if all the other sureties were insolvent, he could recover only one-half the debt of C. *Id.*
4. If one of several co-sureties is insolvent, the other co-sureties will be bound to make contribution as among themselves as if the insolvent surety had not been a surety at all. (See R. C. 1845, p. 1000, § 8.) *Id.*
5. The relation of maker and endorser of a promissory note so far continues after the recovery of judgments against them at the suit of an endorsee that an agreement with the maker to stay execution as to him for a specified period will operate a discharge of the endorser, and entitle him to a perpetual stay of execution. *Smith v. Rice*, 505.

T

TAXATION.

See TAXING POWER.

1. In a suit instituted in behalf of a town, under the 14th section of the act concerning towns (R. C. 1855, p. 1528), to recover of an individual a tax levied on his property, the defendant can not show that there was inequality in the valuation by the assessor of the taxable property of the town. *Town of Potosi v. Casey*, 372.

TAXING POWER.

See TAXATION.

1. No state has power, under the constitution of the United States, in the exercise of its taxing power, to discriminate in favor of its own manufactures and productions and against those of its sister states. Such a discriminating tax, whether levied on the goods and manufactures of sister states in the original unbroken bale or package in which they are brought into the state, or upon the same after they have become incorporated into the mass of property of the state, would be unconstitutional and void. *The State v. North & Scott*, 464.
2. As a state can not, by a direct tax on the manufactures and productions of sister states, discriminate against them, so it can not accomplish such a result indirectly by requiring a merchant dealing in such manufactures to take out a license and pay a tax thereon, while it levies no such tax upon merchants dealing in articles of its own manufacture and growth. *Id.*
3. The act to tax and license merchants, approved December 11, 1855, (R. C. 1855, p. 1072,) so far as the same required merchants dealing in the manufactures of sister states to take out licenses from the state authorities and to pay a tax on the same, is unconstitutional and void. (NAPTON, Judge, dissenting.) *Id.*
4. A state law requiring an importer of foreign goods, who sells the same in the original unbroken package, to take out a license from the state authorities and to pay a tax on the same, would be unconstitutional. *Id.*
5. The provision of the constitution of the state of Missouri which declares that all property subject to taxation shall be taxed in proportion to its value does not require that all the property in the state shall be taxed, but that when any species of property is selected for taxation it shall be taxed in proportion to its value. *Id.*
6. That provision of the constitution of the state of Missouri, which requires all property subject to taxation to be taxed in proportion to its value, is applicable only to taxation in its usual, ordinary and received sense, to taxation for general state, county, city and town purposes, not to local assessments, where the money raised is expended on the property taxed. *Egyptian Levee Co. v. Hardin*, 495.
7. The act of February 27, 1855, (Sess. Acts, 1855, p. 73; also Adj. Sess. 1855, p. 28,) authorizing the Egyptian Levee Company, thereby incorporated, for the purpose of reclaiming a certain district from inundation

TAXING POWER—(*Continued.*)

by leveeing, ditching and embanking, to levy a tax *per acre* (not exceeding fifty cents) upon the land owners within said district, is constitutional; it is not in conflict with that provision of the constitution requiring that all property subject to taxation shall be taxed in proportion to its value. *Id.*

TENANT IN COMMON.

See PARTITION, 1.

TORTS.

See DAMAGES. TRESPASS.

1. If, in a case of collision, both parties are in fault and the fault or negligence of each contributes to the injuries received, neither party can be made to respond to the other. This doctrine does not, however, apply to a case in which the fault or negligence of the party seeking a recovery contributes only remotely and indirectly to the injury complained of. *Adams v. Wiggins Ferry Co.*, 95.
2. If both parties actively contribute to the injury at the time of its commission, there can be no recovery by either; where, however, the fault or negligence of one party is merely passive, as where his wrong consists in mooring his boat in a prohibited place at a wharf, he may recover for an injury arising from a collision if the other party does not exercise ordinary care and prudence. *Id.*
3. Where a person hires a slave for a year and the said slave is wrongfully taken out of his possession during the term of service, the measure of damages in a suit against the wrongdoer is the value of the services of the slave during the residue of the term, even though the suit should be instituted before the expiration of such term. *Moore v. Winter*, 380.

TOWN.

See TAXATION. COMMON. ST. CHARLES.

TREBLE DAMAGES.

See DAMAGES, 8.

TRESPASS.

See DAMAGES. TORTS.

1. It is generally sufficient in pleading to state facts according to their legal effect; an averment, in a petition in trespass, that the defendant beat and struck plaintiff, will be sustained by evidence showing that he was present aiding and encouraging others in so beating and striking him. *Goetz v. Ambts*, 28.
2. To warrant a jury in giving exemplary damages, in an action of trespass, it is not necessary to show that the defendant was prompted by ill will and hostility toward the plaintiff. *Id.*
3. If an injury to the person be committed unintentionally and result simply from a want of care, the damages awarded should be compensatory; if it be wilful and intentional, exemplary damages may be allowed. *Id.*
4. Where in an action of trespass the defendant seeks to show that the

TRESPASS—(Continued.)

plaintiff has no interest in the suit, that he has assigned the cause of action or any interest in the judgment that he expected to obtain, he must set up this matter in his answer. *Id.*

TRUSTEE'S SALE.

See VENDORS AND PURCHASERS.

TRUSTS.

See EQUITY. INJUNCTION. VENDORS AND PURCHASERS. FRAUD AND FRAUDULENT CONVEYANCES, 9.

1. The trusts not reached or affected by the statute of limitations are those technical and continuing trusts that are not at all cognizable at law, but fall within the proper, peculiar and exclusive jurisdiction of courts of equity. *Johnson v. Smith's Adm'r*, 591.
2. If a person, assumig to act as a guardian for another without any legal authority so to do, should receive moneys to be appropriated to the latter's benefit, the statute of limitations would commence to run immediately, unless the existence of a disability should prevent it. *Id.*

U

UMPIRE.

See ARBITRATION.

UNITED STATES SURVEY.

See LANDS AND LAND TITLES.

V

VALUATION.

See TAXATION, 1.

VENDOR AND PURCHASER.

See MORTGAGE. CONVEYANCE. SALE. CONDITIONAL SALE.

1. One A. B., being indebted to C. D. in the sum of \$538.96, conveyed a certain tract of land to E. F. in trust to secure the payment thereof. In said deed the land, situate in St. Louis county, was described as follows: "A tract of eighty acres of land in the northern end of survey number 369, confirmed to Samuel Smith, in township 45 north, of range 4 east, commencing, &c., [here follows a description by metes and bounds] and being all the land now owned by said A. B. within said survey No. 369." Default being made in the payment of the indebtedness secured, the trustee proceeded, at the request of C. D. and in accordance with the provisions of the trust deed, to advertise and sell the land. In his advertisement he described the land to be sold by copying the description in the deed of trust. On the day of sale the trustee proceeded to sell; the advertisement was first read, and the land was offered for sale as a tract containing eighty acres, more or less. Bids were asked by the acre for the whole tract. One G. H.

VENDOR AND PURCHASER—(Continued.)

was the highest bidder at the price of \$8.50 per acre, and the tract was struck off to him at that price, and the trustee gave him a memorandum of said purchase, stating that he, G. H., had become "the purchaser of said land at and for the price of eight dollars and fifty cents per acre, and had paid on his purchase \$500." The trustee paid over the said \$500 to C. D., and it was credited upon the debt. The tract was subsequently surveyed and was found to contain only twenty-three acres. During these transactions none of the parties thereto supposed that the tract contained less than eighty acres. *Held*, in a suit instituted by G. H., the purchaser, against C. D. to recover back the excess of said \$500 over and above the sum that twenty-three acres would have amounted to at \$8.50 per acre, 1st, that the sale by the trustee was not, properly considered, a sale by the acre, but a sale of the tract as a tract; 2d, that the purchaser, having bought the tract as containing eighty acres, could not recover of the *cestui que trust* or creditor the excess sued for; 3d, that he was entitled on the ground of mistake to have the sale set aside. *Coons v. North*, 73.

2. A bathing tub and lead water pipes fastened to the walls and floor of a building by nailing are fixtures as between a vendor and vendee. *Cohen v. Kyler*, 122.
3. A. purchased certain real estate in his own name and with his own money; at the date of the purchase he agreed with B. that if B. would before a certain specified time pay one-half of the purchase money he should be entitled to one-half of the land; *held*, that A., not paying any portion of the purchase money, had no interest, legal or equitable, in the land; that the contract of B. with A. was within the statute of frauds. *Clawwater v. Tetherow*, 241.
4. The record of a deed not acknowledged or proved according to the law in force at the time such record was made, imparts notice to all persons of the contents of such deed. (See R. C. 1855, p. 731; Sess. Acts, 1847, p. 95.) *Allen v. Moss*, 354.
5. Where there has been a part performance of a parol contract for the purchase of land, and the vendor puts it out of his power to specifically perform his contract by selling the land to a *bona fide* purchaser without notice, although there would be no remedy by action at law for damages inasmuch as the contract is by parol, equity will entertain jurisdiction of a bill for compensation. *Lee v. Howe*, 521.
6. Notice by *lis pendens* can exist only after service of process; nor would a purchaser *pendente lite* be affected by such a notice if the suit, during the pendency of which he made his purchase, should be afterwards abandoned. *Herrington v. Herrington*, 560.

VERDICT.

See PRACTICE. JURY. CRIMES AND PUNISHMENTS, 11.

VERIFICATION.

See BOATS AND VESSELS, 8.

VOLUNTARY ASSIGNMENTS.

See ASSIGNMENTS FOR THE BENEFIT OF CREDITORS.

W

WAREHOUSEMAN.

1. The liability of warehousemen and forwarding agents is different from that of common carriers; they are responsible only for losses occasioned by their fault or negligence. *Holtzclaw v. Duff*, 392.
2. Where a common carrier engages to carry goods to a certain point, the terminus of the road, and there to deliver them on board a steamboat, the liability of a common carrier continues only until the arrival of the goods at the terminus of the road, and the liability of a warehouseman and forwarding agent then commences; if the goods are damaged while deposited on the levee awaiting the arrival of a steamboat, the owner can recover only for loss occasioned by negligence. *Id.*

WARRANTY.

1. In an action on a warranty of soundness of a negro slave, the declarations of such slave with respect to her symptoms, made by her when sick, are competent evidence as bearing upon the question of unsoundness. *Wadlow v. Perryman's Adm'r*, 279.

WILLS AND TESTAMENTS.

1. Although an appeal will lie from an order of a probate court revoking letters of administration, yet, where the revocation is made for the reason that a will had been found and admitted to probate, the circuit court can not on such appeal inquire into the sufficiency of the proof upon which the probate court acted in granting probate of the will. *In re, Milton Duty's Estate*, 43.
2. The validity of a will duly proven can be contested only in a proceeding instituted for that purpose under section 30 of the act concerning wills (R. C. 1845, p. 1083; R. C. 1855, p. 1571, sec. 30); an appeal will not lie from an order of a probate court granting probate of a will. *Id.*
3. In March, 1789, one Joachim Roy made his will; it was executed in the presence of the lieutenant governor of Upper Louisiana, and attested by him and seven other witnesses; it was deposited among the archives of the Spanish government and a copy thereof was given out by the lieutenant governor of said province on the 24th of July, 1801, a few months after the death of said Roy; *held*, that the will was a valid and operative instrument under the Spanish law without further proof. *Clark v. Hammerle*, 55.
4. Every person who shall sign a testator's name to a will by his direction must subscribe his own name as a witness and state that he subscribed the testator's name at his request; if he does not so state, the will is void. *Simpson v. Simpson*, 288.
5. A. died in 1844, devising his property as follows: "I hereby grant, give and bequeath unto my beloved wife, B., all and singular my property and estate, real, personal and mixed, in law and equity, including as well all I possess at present as such as I may acquire hereafter, to have and to hold the same unto her, my said wife, as her own and

WILLS AND TESTAMENTS—(Continued.)

exclusive property, and to the exclusion of all and every person or persons, be the same relatives or not, forever." The said A. left him surviving his said wife and four children. *Held*, that there was an intestacy as to the children of A., they not being named or provided for within the meaning of the 30th section of the act concerning wills. (R. C. 1835, p. 620.) *Hargadine v. Pulte*, 423.

6. A devise of land will carry with it a crop growing thereon at the death of the testator unless the testator otherwise directs. *Pratte v. Coffman's Exec'r*, 420.
7. A testator devised a plantation to three grand-children; he then proceeded to direct the sale by the executor of certain real estate, "also all the perishable part of my estate, such as horses, mules, cattle of every description, plantation tools, household and kitchen furniture, crops on hand, and all other personal property not herein otherwise disposed of," &c. *Held*, that a crop growing on said plantation at the death of the testator passed to the devisees and not to the executor. *Id.*

WITNESS.

See WILLS AND TESTAMENTS, 4.

1. In an action for a malicious prosecution, in which it was alleged by the plaintiff that the defendants appeared before the grand jury, and, without probable cause, &c., caused plaintiff to be indicted for perjury, no grand juror can be permitted to testify and disclose the name of any witness who appeared before said jury. *Beam v. Link*, 261.
2. Interest in the event of a suit does not render the person so interested an incompetent witness. *Sawyer v. Mitchell*, 510.
3. The fact that a person introduced as a witness had, before the commencement of the suit, received an order from the plaintiff for sum sued for, the order not being accepted in discharge of the debt due him from the plaintiff, and that he was authorized to bring suit for the plaintiff, does not disqualify him as a witness in behalf of the plaintiff; the suit is not prosecuted for his immediate benefit. *Id.*

WRONGS.

See TORTS.

